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IN THE

SUPREME COURT OF THE UNITED STATES

..... TERM, 1975

No. 74-1393

THOMAS E. SINGLETON,
Petitioner,

vs.

GEORGE J. L. WULFF, JR., M.D.,

and

MICHAEL FREIMAN, M.D.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

..... TERM, 1975

No. _____

THOMAS E. SINGLETON,
Petitioner,

vs.

GEORGE J. L. WULFF, JR., M.D.,
and
MICHAEL FREIMAN, M.D.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The petitioner, Thomas E. Singleton, respectfully prays that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on December 31, 1974.

OPINION BELOW

The opinion of the Court of appeals, reported at 508 F.2d 1211 (8th Cir. 1974), appears in the Appendix hereto. The opinion of the District Court for the Eastern District of Missouri also appears in the Appendix hereto. That opinion is reported at 380 F.Supp. 1137 (E.D.Mo. 1974).

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was entered on December 31, 1974. A timely petition for rehearing, requested by the respondents, was denied on January 9, 1975. On March 26, 1975, Justice Harry A. Blackmun, Associate Justice of the Supreme Court of the United States and Circuit Judge of the United States Court of Appeals for the Eighth Circuit, entered an order extending the time to file petition for writ of certiorari to and including May 8, 1975, and this petition for certiorari was filed within that extended time period. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether there is a logical nexus between the status of respondent-physicians and the claims they seek to have adjudicated sufficient to confer standing on them to challenge the constitutionality of Section 208.152, RSMo Supp. 1973.

2. Whether the Court of Appeals acted in excess of its jurisdiction when it proceeded to determine on the merits the constitutionality of Section 208.152, RSMo Supp. 1973.

3. Whether the decisions of the Supreme Court in *Roe* v. *Wade*, 410 U.S. 113, and *Doe* v. *Bolton*, 410 U.S. 179, compel the conclusion that a state must make Medicaid payments to eligible welfare recipients for non-therapeutic abortions.

4. Whether a state statute which provides medical assistance payments, as a family planning service, but excludes non-therapeutic abortions as a medical expense which the state will pay for as a family planning service, constitutes invidious discrimination if the state does provide medical assistance for pregnancies carried to term and for therapeutic abortions.

5. Whether a state may be compelled, given the restriction on federal power embodied in the Tenth Amendment to the United States Constitution, to choose between the equally objectionable alternatives of denying all Medicaid payments connected with pregnancy, thereby becoming ineligible to receive federal Medicaid grants, or of paying eligible welfare recipients Medicaid for non-therapeutic abortions contrary to the public policy of the state.

STATUTORY PROVISIONS INVOLVED

Section 208.152(12), RSMo Supp. 1973:

> "Benefit payments for medical assistance may be made on behalf of those eligible needy persons who are unable to provide for it in whole or in part, with any payments to be made on the basis of the reasonable cost of the care or reasonable charge for the services as defined and determined by the division of welfare unless otherwise hereinafter provided, for the following:
>
> • • •
>
> (12) Family planning services as defined by federal rules and regulations; provided, however, that such family planning services shall not include abortions unless such abortions are medically indicated."

Title 28, U.S.C. Section 1291:

> "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, ex-

cept where a direct review may be had in the Supreme Court. . . ."

Title 28, U.S.C. Section 2281:

> "An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title. . . ."

STATEMENT OF THE CASE

On November 2, 1973, respondent-physicians filed a three-count complaint against petitioner Singleton, then designated as Chief of Bureau of Medical Services, Division of Welfare, Missouri State Department of Public Health and Welfare, and the State Board of Registration of the Healing Arts. Only Count II pertained to petitioner Singleton. In Count II, respondent-physicians challenged the validity under the United States Constitution of Section 208.152(12), RSMo Supp. 1973. That statutory section excluded non-medically indicated abortions from the range of medical assistance benefit payments, for family planning services, available to eligible needy persons. The complaint requested that the statutory section be declared in violation of the United States Constitution and that the enforcement thereof be permanently enjoined.

On December 12, 1973, respondent-physicians propounded four interrogatories to petitioner Singleton, which were answered on January 15, 1974 (except Interrogatory No. 4 to which objection was made).

On December 14, 1973, the petitioner Singleton's Motion to Dismiss was mailed for filing to the Clerk of the United States District Court for the Eastern District of Missouri. Petitioner Singleton stated four reasons why the complaint should be dismissed, including the following:

> "(2) That the plaintiff doctors do not possess the required standing to litigate the constitutional issues raised."

Attached to respondent-physicians' Memorandum in Opposition to Appellee Singleton's Motion to Dismiss, filed on February 18, 1974, are affidavits from each of the respondent-physicians.

The statutory three-judge court entered its Order and Judgment supported by a Memorandum on May 31, 1974, dismissing Count II of the Complaint on the ground that respondents lacked standing to challenge Section 208.152(12).

Seventeen days thereafter, on June 17, 1974, respondent-physicians filed a "Motion for Leave of Court to Add Parties Plaintiff", which was overruled on June 24, 1974.

Respondent-physicians duly filed their notice of appeal to the United States Court of Appeals for the Eighth Circuit on June 28, 1974.

On or about July 6, 1974, petitioner Singleton filed with the Court of Appeals his Motion to Dismiss Appeal on the ground that under 28 U.S.C. § 1253, appeal from a final order of a three-judge district court must be made to the United States Supreme Court. This motion was overruled on July 18, 1974.

The United States Court of Appeals for the Eighth Circuit issued its opinion reversing the decision of the District Court on December 31, 1974. The Court of Appeals found it had appellate jurisdiction pursuant to the United States Supreme Court's decision in *Gonzalez* v. *Automatic Employees Credit Union*, 42 L.Ed.2d 249, —— U.S. —— (1974), that the respondent-physicians had standing to adjudicate the constitutionality of the state statute in question; that the Court of Appeals had jurisdiction to reach the merits of the constitutionality of the state statute in question even though the petitioner had never filed an answer in the three-judge District Court below nor had an opportunity to brief or argue the constitutionality of the state statute under attack, and that the state statute in question was facially unconstitutional.

The respondent-physicians filed a motion for rehearing, asking for clarification and an award of attorneys' fees, on January 6, 1975. The Court of Appeals denied the motion for rehearing on January 9, 1975.

On January 31, 1975, the Court of Appeals denied petitioner's request for stay of mandate. Mandate issued on February 5, 1975.

Justice Blackmun granted petitioner an extension of time to file writ of certiorari to and including May 8, 1975, on March 26, 1975.

REASONS FOR GRANTING THE WRIT

I

The Court of Appeals erroneously held that the respondent-physicians had standing to assert the unconstitutionality of Section 208.152(12), RSMo Supp. 1973, and, in so doing, rendered a decision in conflict with the opinions of the Supreme Court on the matter of standing.

The three-judge District Court was correct in its determination that the posture of respondents in asserting the unconstitutionality of the state statute in question satisfied neither the standing requirement of *Flast* v. *Cohen*, 392 U.S. 83, 192 (1968), that there be a logical nexus between the status asserted by the complainant and the claim sought to be adjudicated, nor the requirement of *Association of Data Processing Service Organizations Inc.* v. *Camp*, 397 U.S. 150, 153 (1970), that the interest sought to be protected by the complaining party be within the zone of interests meant to be protected or regulated by the constitutional guaranty relied upon.

As emphasized by the District Court, Section 208.152 provides for the payment of medical assistance benefits "on behalf of those eligible needy persons who are unable to provide for it in whole or in part . . . ." Not only are payments made on behalf of eligible persons, but only the welfare recipient is granted a right to a hearing if the welfare recipient's claim for medical reimbursement is denied. A doctor is not granted a right of appeal. See Title 45, Code of Federal Regulations, Public Welfare, Chapter II, Section 205.10 (revised as of October 1, 1973), and Section 208.156, RSMo 1969. Therefore, eligible needy persons are the intended beneficiaries of Section 208.152; eligible needy persons are the people hurt by the operation of any restriction placed on the payment of medical assistance benefits be-

cause they are not provided the needed cost reimbursement; and welfare recipients are the ones given a statutory right to appeal adverse determinations. In determining the existence of standing, it is entirely appropriate that the Court consider whether the complainants asserting standing are the intended beneficiaries of the statute in controversy. *Barlow* v. *Collins,* 397 U.S. 159, 164-165 (1970).

Furthermore, respondent-physicians lack the kind of direct threat of personal detriment which is necessary to sustain their standing to challenge the constitutionality of Section 208.152 under *Flast.* This fact can be demonstrated on the basis of the very cases which the Court of Appeals cited in pages 3 through 5 of its opinion, which is appended hereto. For instance, in *Doe* v. *Scott,* 321 F.Supp. 1385 (N.D.Ill. 1970), vacated 410 U.S. 950 (1973), *Roe* v. *Wade,* 410 U.S. 113 (1973), and *Doe* v. *Bolton,* 410 U.S. 179 (1973), the plaintiff-physicians were subject to the provisions of criminal anti-abortion statutes and, therefore, had the requisite direct threat of personal detriment to sustain their standing. In *Nyberg* v. *The City of Virginia,* 495 F.Supp. 1342 (8th Cir. 1974) and *Word* v. *Poelker,* 495 F.2d 1349 (8th Cir. 1974), regulations had been adopted the effect of which was to prohibit substantially and directly the granting of abortions, thus having a direct effect on a woman's right under *Roe* v. *Wade, supra,* to obtain an abortion and having a direct effect on a physician's right to practice medicine by performing abortions.

In the instant case, however, respondent-physicians are not subject to any criminal sanctions by the operation of Section 208.152, nor does Section 208.152 operate in such a manner as to prohibit respondent-physicians from performing abortions. Section 208.152 does not in any manner prohibit doctors from being paid for their services. The only effect that Section 208.152 has on respondent-physicians is to create some uncertainty as to the source of payment for abortion services rendered by them. No direct interest exists sufficient to create a logical nexus, under *Flast,* between the status asserted by respondents and the claimed unconstitutionality of the statute. In holding that the respondent-physicians have standing to assert the unconstitutionality of the state statute, the Court of Appeals contributed to an unwarranted and unjustified erosion of the Article III restrictions on federal courts' jurisdiction.

Likewise, the respondents cannot establish standing on the basis that they are representing the rights of their patients. Not having standing in their own right to challenge Section 208.152, respondents may not bring this action on behalf of their patients to protect their patients' fundamental rights. *Tileston* v. *Ullman,* 318 U.S. 44, 46 (1943).

The general rule under *Tileston,* that only those persons having constitutional rights should be able to assert those rights in the federal courts, can be avoided only where the complaining parties have clear and obvious standing on their own behalf as, for example, being subject to criminal prosecution, *Griswold* v. *Connecticut,* 381 U.S. 479, 481 (1965), or where the parties whose rights are to be represented cannot advance those rights on their own behalf as in *Barrows* v. *Jackson,* 346 U.S. 249, 257 (1953), and *N.A.A.C.P.* v. *Alabama,* 357 U.S. 449, 459 (1958). In the instant case, as discussed above, the respondents do not have standing in their own right, are not subject to prosecution by reason of the existence of Section 208.152, and therefore cannot acquire standing under the exception of *Griswold* v. *Connecticut, supra.* Also, the indigent women which Section 208.152 was intended to benefit are fully able to advance their own rights. For example, in *Klein* v. *Nassau County Medical Center,* 347 F.Supp. 496, 498 (E.D.N.Y. 1972), all plaintiffs were pregnant at

the time they became plaintiffs; all plaintiffs had applied at different times for an abortion; all plaintiffs asserted that they could not afford abortions; all plaintiffs up to the time they filed suit had been unable to obtain an abortion; and all plaintiffs alleged that they were indigent.

The failure of the Court of Appeals to interpret correctly and adhere to the standing decisions of the Supreme Court justifies the grant of certiorari to review the judgment below, and, upon review of that judgment, the Supreme Court should reverse the Court of Appeals and declare that the District Court correctly held the respondent-physicians had no standing to assert the unconstitutionality of Section 208.152.

II

The Court of Appeals erroneously determined that it had jurisdiction to examine the merits of this case, reaching the constitutionality of a state statute, because the District Court was given no opportunity itself to examine the constitutionality of Section 208.152, nor was the petitioner ever given an opportunity to defend the constitutionality of that statute, and, to that extent, the determination by the Court of Appeals, on the merits, that the statute was unconstitutional so departs from the accepted and usual course of judicial proceedings as to call for an exercise of the United States Supreme Court's power of supervision.

When the District Court dismissed Count II of the respondent's complaint for their lack of standing to assert the unconstitutionality of Section 208.152(12), RSMo 1973 Supp., the respondents appealed that order of dismissal to the Court of Appeals. On the record before the Court of Appeals it was clear that the petitioner had never answered the respondents' complaint; that the constitutionality of the state statute had never been placed at issue in the District Court; that the District Court had never conducted a hearing or other inquiry into the constitutionality of the state statute on its face or as applied; that the District Court had not ruled upon the constitutionality of that state statute; and that the petitioner had never had an opportunity to brief or argue the constitutional merits of Section 208.152. Nevertheless, the Court of Appeals, once it found that the respondents had standing, proceeded to reach the merits. In doing so, the Court of Appeals acted in excess of its jurisdiction.

In effect, the Court of Appeals took unto itself original jurisdiction to determine the constitutionality of a state statute which issue had not been properly before, nor decided, by the District Court from which the appeal was taken.

Exclusive original jurisdiction is conferred upon three-judge district courts when a state statute or administrative order is challenged, a state officer is named as a party defendant, injunctive relief is sought, and it is claimed that the state statute or administrative order is contrary to the United States Constitution. *Holiday Magic, Inc.* v. *Warren,* 497 F.2d 687 (7th Cir. 1974); Title 28, U.S.C. § 2281. All of those elements were present in Count II of the Complaint filed by the respondents in the District Court. However, in the instant case, the District Court never considered the allegations containing those elements but ordered the dismissal of the lawsuit because the respondents had insufficient standing to sue. Although the entire three-judge court ordered the dismissal of Count II, a single judge could have entered an order dismissing the case for lack of standing. *Gonzalez* v. *Automatic Employees Credit Union,* —— U.S. ——, 42 L.Ed.2d 249 (1974). To that extent, the Court of Appeals was correct in finding that it had jurisdiction of the respondents' appeal from the order dismissing Count II of respondents' complaint. However,

a single-judge District Court could not have passed on those allegations of Count II qualifying the complaint for a three-judge District Court pursuant to Title 28, U.S.C. § 2281. Therefore, the Court of Appeals did not have jurisdiction to review the substance of respondents' Count II.

Article III of the United States Constitution grants unto Congress the power to establish and proscribe the jurisdiction of federal courts. Congress has provided that:

> "The courts of appeal should have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court." Title 28, U.S.C. § 1291.

Hence, the Courts of Appeal have only appellate and no original jurisdiction. The constitutionality of Section 208.152, RSMo Supp. 1973, was not appealed to the Court of Appeals because the issue had never been determined by the District Court. Therefore, the Court of Appeals acted in excess of its jurisdiction when it reached the merits of this case because it did not have the requisite original jurisdiction to make such a determination.

It is well recognized that a Court of Appeals should not reach on appeal the merits of an issue on which a District Court has not ruled. *Equal Opportunity Commission* v. *Standard Forage and Axel Co., Inc.*, 496 F.2d 1392 (5th Cir. 1974); *Eureka-Carlisle Company* v. *Rottman*, 398 F.2d 1015, 1019 (10th Cir. 1968); and *Fitts* v. *U.S.*, 376 F.2d 516 (10th Cir. 1967). It is even more fundamental that constitutional questions should not be considered for the first time on appeal. *Giordano* v. *United States*, 394 U.S. 310, 312-313 (1969); *Bandy* v. *U.S.*, 396 F.2d 929, 930; cert. den.

393 U.S. 1004 (1968); *Gardner* v. *Myers*, 491 F.2d 1184, 1190 (8th Cir. 1974).

Once the Court of Appeals determined that the respondent-physicians had the requisite standing to sue, that court should have remanded the matter to the three-judge District Court for proceedings consistent with the Court of Appeals' finding. Present in Count II of the complaint which would then be before the three-judge District Court were all the elements necessary to invoke the jurisdiction of such a court pursuant to Title 28, U.S.C. § 2281. The petitioner would then have been afforded an opportunity to file his answer defending the constitutionality of Section 208.152 on its face or as applied, and to present evidence and legal arguments to the District Court to assist that court in making a fully informed determination as to the constitutionality of that state statute.[1] As the matter now stands, the Court of Appeals has abrogated the entire con-

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[1] For example, Section 208.152 excludes non-medically indicated abortions as a family planning service which will be publicly funded. Absent a District Court record the Court of Appeals could not have known whether abortion may or may not have been funded under a different category. Proposed federal regulations, not yet promulgated but printed at Vol. 39, Federal Register No. 237, would exclude all abortions from family planning services for which the federal government share is 90 percent. However, abortions would still qualify as a physician's service, the federal share of which is 60 percent. The Court of Appeals had no way of knowing the intricacies of how Section 208.152 was applied or if it absolutely prohibited medical assistance payments for abortion. Absent a defense by the petitioner and an evidentiary hearing by the court of original jurisdiction, the Court of Appeals had an insufficient record on which to base a constitutional decision.

gressional scheme of federal court jurisdiction. Certainly, if the District Court had made a determination concerning the constitutionality of the state statute, appeal should properly have been taken to the United States Supreme Court. It is entirely illogical to assume that a Court of Appeals could step into the case on the peripheral issue of standing and render a decision concerning the constitutionality of the state statute which decision has been reserved by Congress solely to a three-judge District Court and, on appeal, to the United States Supreme Court.

Because the action of the Court of Appeals in reaching the merits of this case constitutes such a drastic departure from the accepted and usual course of judicial proceedings, the United States Supreme Court should exercise its power of supervision and grant certiorari to review the judgment below.

III

The Court of Appeals erroneously held Section 208.152(12), RSMo Supp. 1973, to be unconstitutional, and, in doing so, the Court of Appeals passed upon a legal issue which has not heretofore been determined in the United States Supreme Court but which should finally be settled by this court.

There is no constitutional requirement that a state provide financial assistance for voluntary abortion as a condition of providing benefits for other medical treatment relating to pregnancy.

The opinion below announces a legal proposition as follows:

> ". . . the statute here provides medical payments if the pregnancy is carried to term or for therapeutic abortion but not if a non-therapeutic abortion is performed. This classification is a clear violation of the Equal Protection Clause of the Fourteenth Amendment."

Wulff v. *Singleton*, 508 F.2d 1211, 1215 (8th Cir. 1972). Page 8 of the opinion appended hereto.

We submit that there is no support whatsoever in the decisions of this Court for a holding that a state cannot finance necessary medical procedures unless it also agrees to finance procedures which are purely optional. *Roe* v. *Wade*, 410 U.S. 113 (1973), and *Doe* v. *Bolton*, 410 U.S. 179 (1973), go no further than holding that voluntary abortion may not be made the subject of criminal sanctions when timely performed. It is quite another thing to say that a state must give financial assistance to an abortion simply because an indigent person chooses to have one.

The Equal Protection Clause prohibits only invidious discrimination. It does not enjoin differential treatment based on a reasonable classification in support of valid policy.

Thus a state may provide that local schools are to be financed substantially by local property taxes in spite of the wide variation of the taxing resources of the several districts. *San Antonio Independent School District* v. *Rodriguez*, 411 U.S. 1 (1973).

A state may permit in-term salary increases for judges of some courts which are denied to other judges. *Ohio Municipal Judges Association* v. *Davis*, 411 U.S. 144 (1973).

Widows may be afforded tax exemptions which are not available to widowers. *Kahn* v. *Shevlin*, —— U.S. ——, 94 S.Ct. 1734 (1974).

A state may exclude disabilities due to normal pregnancy in a disability insurance program while covering other disabilities of comparable duration including dis-

ability through abnormal pregnancy conditions. *Geduldig* v. *Aiello*, —— U.S. ——, 94 S.Ct. 2485 (1974).

A state may furnish textbooks or transportation to public school pupils without providing equivalent services for those who attend non-public schools, in spite of the constitutional permission for such aid. *Bruska* v. *Missouri*, 332 F.Supp. 275 (E.D.Mo. 1971); aff'd. 405 U.S. 1050 (1972).

The federal government is not required to provide veterans' benefits to conscientious objectors who elect alternate service. *Johnson* v. *Robinson*, —— U.S. ——, 94 S.Ct. 1160 (1974), decided under the "due process" analogy to the Equal Protection Clause.

In the above cases this Court has sustained differential treatment which is incidental to the effectuation of valid government policy. The details of the particular policy situations are not appropriate for discussion at this point. It is sufficient to say that there are valid reasons why a state may decide that, although voluntary abortions are permissible within certain time limits, the state does not choose to give positive assistance to the abortion process. Quite aside from the conviction that abortion is undesirable and to be discouraged, the state has a proper interest in the allocation of limited resources and facilities. The contrary holding of the Court below is in conflict with the approach of this Court in numerous cases, and an unwarranted interference with state policy. The conflict between the decision of the Court below and the decisions of this Court in equal protection matters justify the grant of certiorari to review the judgment below which judgment involves an issue which has not yet been determined by this Court but which should be.

IV

The Court of Appeals erroneously held that the state must provide medical payments for non-therapeutic abortions if it provides medical payments for pregnancies carried to term or for therapeutic abortions because the effect of that holding is to condition the receipt of federal medicaid funds upon state subsidization of non-therapeutic abortions which result coerces the state into making payments for non-therapeutic abortions in contradiction to the expressed public policy of the State of Missouri and thereby interferes with a power reserved to the state by the Tenth Amendment to the United States Constitution.

The Court of Appeals held that it was an unconstitutional classification for the State of Missouri to make Medicaid payments for pregnancies carried to term and for therapeutic abortions if Medicaid payments were not also made for non-therapeutic abortions. In effect, the decision of the Court of Appeals gave the State of Missouri one of two equally unsatisfactory options: either the State of Missouri must refuse to pay for all medical assistance connected with pregnancies at the expense of millions of dollars in federal Medicaid grants; or the State must make Medicaid payments for non-therapeutic abortions contrary to the public policy of Missouri.

Title 42, U.S.C. § 1396 conditions a federal grant to a state for medical assistance programs upon the submission, by the state, of an approved state plan for medical assistance. Title 42, U.S.C. § 1396 a.(10) (A) requires the state plan to provide for making medical assistance available to all eligible individuals. Title 42, U.S.C. § 1396 d.(a) (5) defines medical assistance as including physicians services. The term "physicians services" is defined by Title 22, U.S.C. § 1395 x.(q) as meaning ". . . professional services performed by physicians, including surgery, consultation,

and home, office, and institutional calls. . . ." In amplification of federal statutory language, Title 45, C.F.R. § 249.10, provides:

> "(a) *State Plan Requirements.*—A State plan for medical assistance under title XIX of the Social Security Act must:
>
> (1) Specify that at least the first five items of medical and remedial care and services as set forth in paragraph (b) (1) through (5) of this section will be provided to the categorically needy.
>
> • • •
>
> (b) *Federal Financial Participation.*—Subject to limitations in paragraph (c) of this section Federal financial participation is available and expenditures for medical or remedial care and services under the State plan which meet the following definitions:
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> • • •
>
> (5) *Physicians' services, whether furnished in the office, the patient's home, a hospital, a skilled nursing home or elsewhere.* 'Physicians' services' are those services provided, within the scope of practiec of his profession as defined by State law, by or under the personal supervision of an individual licensed under State law to practice medicine or osteopathy."

Petitioner Singleton has been administering the Division of Family Services of the Department of Social Services, in accordance with instructions passed on by federal administrators, on the premise that should the state plan fail to provide for prenatal services for eligible individuals choosing to carry a pregnancy to term, or if the state refused to pay for such services contrary to its state plan, that the State of Missouri would cease to be eligible for federal Medicaid grants. Using the present fiscal year as a

basis, this would cost the State of Missouri approximately 66 million dollars a year.

The decision by the Court of Appeals in conjunction with the provisions of Title XIX of the Social Security Act, and the rules and regulations promulgated thereunder, constitutes an unwarranted and unconstitutional intrusion by the federal courts and Congress into the internal affairs of the sovereign State of Missouri. The effect, *in toto*, of the Court of Appeals opinion and the statutes discussed above is to force the State of Missouri to fund publicly non-therapeutic abortions, against the public policy of the state as announced by its Legislature, because refusal to do so would forfeit all federal Medicaid grants.

The coercive nature of the Court of Appeals opinion, when combined with federal law and regulations, affirmatively conditioning the receipt by the State of Missouri of 66 million dollars in Medicaid funds upon the giving of non-therapeutic abortions, should not be tolerated in a federal system of government with powers and rights reserved to the states as independent political entities by reason of the Tenth Amendment to the United States Constitution.

There can be no doubt that the overall coercive effect of the Court of Appeals opinion and the federal Social Security Law will force the State of Missouri to abandon a long and deeply held internal policy totally against the concept of abortion except as necessary to save the wife or the mother. Prior to *Roe, supra,* and *Doe, supra,* the public policy of Missouri as expressed in statutory sections clearly demonstrated that abortion was against the public policy of the state. That position has not changed. Very recently, the State of Missouri became the first state in the union to pass a resolution requesting Congress to initiate those actions necessary to the creation of a constitutional amend-

ment taking abortion out from under the protection of the United States Constitution. Certainly, it is contrary to the Tenth Amendment if the federal government can induce, by the threatened termination of the entire Medicaid program in Missouri, the State to subsidize abortions contrary to the public policy created by the State Legislature.

The opinion by the Court of Appeals does not logically follow the decisions of this court in *Roe, supra,* and *Doe, supra.* It is a much different thing to say that a doctor cannot be legally prosecuted for performing an abortion requested by a pregnant woman than to say, as the Court of Appeals has done, that states must subsidize the abortion process with public funds.

The question of whether a state must publicly subsidize non-therapeutic abortions for eligible Medicaid recipients is one which has not been determined by the Supreme Court but which should be brought before this Court for final determination.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Eighth Circuit.

Respectfully submitted,

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APPENDIX 1

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 74-1484

GEORGE J. L. WULFF, JR., M.D. and MICHAEL FREIMAN, M.D.,

Appellants,

vs.

THOMAS E. SINGLETON, Chief of Bureau of Medical Services, Division of Welfare, State Department of Public Health and Welfare,

Appellee.

Appeal from the United States District Court for the Eastern District of Missouri

Submitted: December 13, 1974
Filed: December 31, 1974

Before MATTHES, Senior Circuit Judge, ROSS and STEPHENSON, Circuit Judges.

STEPHENSON, Circuit Judge.

This appeal from the order of a statutory three-judge district court dismissing plaintiffs' cause of action for lack of standing raises troublesome questions of jurisdiction and procedure as well as a question concerning state interference with the abortion decision. The three-judge court opinion is reported as *Wulff* v. *State Board of Registration for Healing Arts,* 380 F. Supp. 1137 (E.D. Mo. 1974). We reverse.

Appellants, Missouri licensed medical doctors, brought

a three count complaint for declaratory and injunctive relief against the Missouri State Board of Registration for the Healing Arts and against Thomas E. Singleton in his capacity as Chief of the Bureau of Medical Services. The complaint challenged the constitutionality of state statute regarding welfare benefits, claiming that the statutory wording

> is vague and uncertain, deprives plaintiffs and their patients of the right to privacy, deprives plaintiffs of their right to practice medicine according to the highest standards of medical practice, deprives plaintiffs' patients of the fundamental right of a woman to determine for herself whether to bear children, infringes upon plaintiffs' right to render and their patients' right to receive safe and adequate medical advice and treatment, deprives plaintiffs and their patients of the equal protection of the law and due process of law, and constitutes state interference with the abortion decision, all of which is in violation of the United States Constitution.

380 F. Supp. 1137, 1139.

The three-judge court dismissed Count II of the complaint for lack of standing by the medical doctors to challenge the constitutionality of the statute. *See Wulff, supra* at 1144. Appeal was filed in this court.[1]

I. APPELLATE JURISDICTION

The portal question we have goes to the propriety of an appeal to this court from an order entered by a district court of three judges.[2]

---

[1] The appeal concerns only Count II of the complaint. Appellants do not challenge the district court's ruling on Counts I and III.

[2] 28 U.S.C. § 1253 provides:

> Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.

That inquiry has been settled for us in the instant case by the United States Supreme Court's recent decision in *Gonzalez* v. *Automatic Employees Credit Union*, No. 73-858 (filed December 10, 1974), 43 Law Week 4025.

In *Gonzalez* appellant took his appeal directly to the Supreme Court from a three-judge court order dismissing the complaint for lack of standing. The court observed that when the basis of decision by a three-judge court is lack of standing, the case is such that "a single judge could have declined to convene a three-judge court" or "the three-judge court could have dissolved itself, leaving final disposition of the complaint to a single judge." *Gonzalez* at 4028 (footnote omitted). The Court went on to say:

> We hold, therefore, that when a three-judge court denies a plaintiff injunctive relief on grounds which, if sound, would have justified dissolution of the court as to that plaintiff, or a refusal to request the convention of a three-judge court *ab initio*, review of the denial is available only in the Court of Appeals.

43 Law Week 4025, 4028-29. This court has jurisdiction in the instant case.

II. STANDING

The district court found that there was no logical nexus between the status of appellant-physicians and the claims they sought to have adjudicated. *Flast* v. *Cohen*, 392 U.S. 83 (1968). We disagree.

This court made clear in *Nyberg* v. *City of Virginia*, 495 F.2d 1342 (1974), *cert. denied*, 95 S.Ct. 169:

> We think that the Supreme Court in Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973) and Doe v. Bolton, 410 U.S. 179, 93 S.Ct. 739, 35 L.Ed.2d 201 (1973) has clearly paved the way for physicians

to assert their constitutional rights to practice medicine, which now includes the right to advise and perform abortions. • • •

• • •

Clearly the claims of medical doctors to "freely practice medicine according to the highest medical standards without arbitrary outside restraints" are inextricably bound up with the privacy rights of women who seek abortions, YWCA v. Kugler, 342 F. Supp. 1048, 1055 (D.N.J. 1972). This is sufficient to present a justifiable controversy and confer standing on the physicians who bring this action. *See* Griswold v. Connecticut, 381 U.S. 479, 481, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965); Abele v. Markle, 452 F.2d 1121, 1125 (CA2 1971); stay granted, 409 U.S. 908, 93 S.Ct. 212, 34 L.Ed.2d 169 (1972), remanded for consideration in light of Roe and Doe, 410 U.S. 951, 93 S.Ct. 1417, 35 L.Ed.2d 683 (1973); Doe v. Turner, 361 F.Supp. 1288, 1289 (D.Iowa 1973) (3 judge court); Freeman & Bass, P. A. v. State of N.J. Com'n of Invest., 359 F.Supp. 1053, 1059 (D.N.J. 1973); *cf.* O'Shea v. Littleton, 414 U.S. 488, 94 S.Ct. 669, 38 L.Ed.2d 674 (1974). Furthermore, the practical effect of the stringent limitation on the use of hospital facilities for performing abortions is to arbitrarily bar the physicians from activities that directly affect their economic interests. Abele v. Markle, *supra,* 452 F.2d at 1125; *see also,* Data Processing Service v. Camp, 397 U.S. 150, 90 S.Ct. 827, 25 L.Ed.2d 184 (1970); Epperson v. Arkansas, 393 U.S. 97, 89 S.Ct. 266, 21 L.Ed.2d 228 (1968).

We reiterated the same thought more succinctly in *Word* v. *Poelker,* 495 F.2d 1349, 1350 (8th Cir. 1974), where we said:

> It is now clear from the decisions in Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973) and Doe v. Bolton, 410 U.S. 179, 93 S.Ct. 739, 35 L.Ed2d 201 (1973) that a sweeping regulation of the abortion decision and its implementation raises clear questions of constitutional dimension regarding a medical doctor's right to practice. Doe v. Bolton, *supra* at 188, 93 S.Ct. 739; Roe v. Wade, *supra* at 165 of 410 U.S., 93 S.Ct. 705. • • • .

See Orr v. *Koefoot,* 377 F. Supp. 673, 678 (D. Neb. 1974); *Poe* v. *Menghini,* 339 F. Supp. 986, 990 & note 8 (D. Kan. 1972); *Doe* v. *Scott,* 321 F. Supp. 1385, 87-88 (N.D. Ill. 1970); *see also Wounded Knee Legal Defense/Offense Committee* v. *F.B.I.,* No. 73-1908 (8th Cir., filed November 7, 1974), slip opinion at 6.

The statute in question interferes with the doctor-patient relationship as it relates to the abortion decision. It injects unnecessarily restrictive rules upon a constitutionally protected decision of doctor and patient as surely as did the statutes in the above cited cases. The statute interferes with the appellants' practice of medicine both professionally and monetarily.

We think that there is no question that (1) appellants allege that the challenged acts have caused them "injury in fact, economic or otherwise" and (2) "the interests sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Association of Data Processing Service Organizations, Inc.* v. *Camp,* 397 U.S. 150, 152-53 (1970). To hold otherwise in light of the authority cited above would defy logic. These medical doctors have standing to pursue this action.

III. THIS COURT'S JURISDICTION TO REACH THE MERITS

We are urged by appellants to reach the merits of this case rather than remand to the three-judge court. This question is not without its difficulty. There is little direct authority for the propriety of our reaching the merits. Nevertheless, we are satisfied that under the circumstances of this case and in the interest of judicial economy and logic we should now address the merits of this controversy.

Of course, the three-judge court has not determined the merits. This court is not generally a court of original jurisdiction. Even so, there is authority for the proposition that when a case is properly before a Court of Appeals, the court has the power "to do what plainly ought to be done." *Mercury Motor Express, Inc.* v. *Brinke,* 475 F.2d 1086, 1091 (5th Cir. 1973), *citing* 9 Moore's Federal Practice § 110.25[1] (2d ed. 1972).

In reaching the merits of a case which was before the court pursuant to an interlocutory appeal under 28 U.S.C. § 1292(b) this court said:

> We adhere to the proposition that it would be improper to consider "grave constitutional questions" where there exists "reasonable likelihood" that further proceedings could help clarify the issues. *Borden's Farm Products Co.* v. *Baldwin,* 293 U.S. 194, at 213, 55 S. Ct. 187, 79 L.Ed. 281. However, in the present proceeding no further pleadings or evidence is necessary for "refinement or clarification of the issues." *United States* v. *Petrillo,* 332 U.S. 1, 67 S. Ct. 1538, 91 L.Ed. 1877; *United States* v. *Fabro, Inc.,* M.D. Ga., 206 F. Supp. 523. And we should dispose of all controversies "as expeditiously as is consistent with proper judicial administration." *Turner* v. *City of Memphis,* 369 U.S. 350, 82 S. Ct. 805, 7 L.Ed.2d 762.

Board of Managers of Ark. Tr. Sch. for Boys v. *George,* 377 F.2d 228, 231 (8th Cir. 1967). In addition, Mr. Justice Clark in writing for the Supreme Court has indicated that effective judicial administration requires disposal of the case on appeal rather than remanding, where the point to be decided is clear. *Levin* v. *Mississippi River Fuel Corporation,* 386 U.S. 162, 170 (1967), 87 S. Ct. 927, 932.

It might be argued that the above authority, though persuasive, should not apply in the instance of an appeal to the Court of Appeals from a statutory three-judge court.

The Supreme Court has made it clear that the three-judge court mandate must be construed quite narrowly. "Congress established the three-judge court apparatus for one reason: to save state and federal statutes from improvident doom, on constitutional grounds, at the hands of a single federal district judge." *Gonzalez, supra* 43 Law Week 4027.

For this court to get to the heart of the matter and dispose of this case on the merits will not conflict with the policy behind the statute. Indeed, we think this case is particularly proper for disposition in this court since "[w]hile § 2281 calls for three judges to enjoin a statute 'upon the ground' of its 'unconstitutionality,' we [the Supreme Court] have held that three judges are not in fact necessary where the unconstitutionality of the statute is obvious and patent * * *." *Gonzalez, supra* at 4027, footnote 14, *citing Bailey* v. *Patterson,* 369 U.S. 31 (1962).

The statute in question is obviously unconstitutional, and it is our view that the case might well have been decided by one federal judge. *See generally Roe* v. *Norton,* 380 F. Supp. 726, 728 (D. Conn. 1974). Accordingly, we choose to make final determination of this case.

IV. MERITS

The statute before the court states:

Benefit payments for medical assistance may be made on behalf of those eligible needy persons who are unable to provide for it in whole or in part, with any payments to be made on the basis of the reasonable cost of the care or reasonable charge for the services as defined and determined by the division of welfare unless otherwise hereinafter provided, for the following:

• • •

Family planning services are defined by federal rules and regulations provided, however, that such family planning services shall not include abortions unless such abortions are medically indicated.

As in *Word* v. *Poelker, supra* 495 F.2d 1349, 1350, the issue in this case concerns the facial constitutionality of the statute viewed against the glare of the Supreme Court's decisions in *Roe* v. *Wade, Doe* v. *Bolton,* and the precedent which has developed as a result of those cases.

We find it unnecessary to review again *Roe* and *Doe* or what this court has said in applying those cases. Suffice it to say that the statute here provides medical payments if the pregnancy is carried to term or for therapeutic abortions but not if a non-therapeutic abortion is performed. This classification is a clear violation of the Equal Protection Clause of the Fourteenth Amendment.

There is ample case authority for the holding that a welfare payments statute which places special regulation on abortion but not upon other medical procedures cannot stand in light of the Supreme Court decisions. *Doe* v. *Rose,* 499 F.2d 1112 (10th Cir. 1974); *Doe* v. *Westby,* ——F. Supp.——, No. 74-5017 (W.D. S.D., filed September 24,

1974); *Roe* v. *Norton,* 380 F. Supp. 726 (D. Conn. 1974); *Doe* v. *Wohlgemuth,* 376 F. Supp. 173 (W.D. Pa. 1974); *Doe* v. *Rompton,* 366 F. Supp. 189 (D. Utah 1973); *Klein* v. *Nassau Co. Medical Center,* 347 F. Supp. 496 (E.D. N.Y. 1972); *see also Doe* v. *Hale Hospital,* 500 F.2d 144 (1st Cir. 1974).

The control meted out by this statute does not give proper consideration to the conflicting constitutional interests involved. *Word, supra* at 1351. It is further invalid since the welfare parent and her physician are discriminated against by reason of the patient's poverty. *Compare, e.g., Klein, supra.*

We declare RSMo 208.152(12) to be unconstitutional on its face. Injunctive relief should be unnecessary. We assume that the state will abide by the ruling of this court and that medical assistance payments will be made on a nondisparate basis to those eligible needy persons who elect to carry their pregnancy to term or who receive therapeutic abortions and also to those who elect non-therapeutic abortions.

Reversed.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX 2

UNITED STATES DISTRICT COURT

E. D. Missouri, E. D.

May 31, 1974.

GEORGE J. L. WULFF, JR., M.D., and MICHAEL FREIMAN, M.D.,
Plaintiffs,

vs.

The STATE BOARD OF REGISTRATION FOR the HEALING ARTS and THOMAS E. SINGLETON, Chief of Bureau of Medical Services, Division of Welfare State Department of Public Health and Welfare,
Defendants.

No. 73 C 731(A).

MEMORANDUM

This matter is before the Court on motion of defendant, State Board of Registration for the Healing Arts (hereinafter referred to as State Board), to dismiss Counts I and III of the plaintiffs' complaint, and on motion of defendant, Thomas E. Singleton, to dismiss Count II of plaintiffs' complaint. Counts I and III name the State Board as defendant and Count II names Thomas E. Singleton as defendant.

Plaintiffs, George J. L. Wulff, Jr. and Michael Freiman, are physicians licensed by the State of Missouri, engaging in the practice of obstetrics and gynecology. Defendant, State Board, is an administrative board created by Missouri state statutes charged with the licensing of physicians. The State Board has the power to revoke or suspend a physician's license for unprofessional and dishonorable conduct

under RSMo 334.100. Defendant, Thomas E. Singleton, is the Chief of the Bureau of Medical Services, Division of Welfare, State Department of Public Health and Welfare, for the State of Missouri. In his capacity as Chief of the Bureau of Medical Services, Singleton oversees the applications, approvals, denials and payments of claims for payment and reimbursement of medical expenses arising from or related to the procedure of abortion for women eligible for Missouri State Medicaid assistance.

The plaintiffs' complaint for declaratory judgment and injunctive relief alleges jurisdiction in this Court under 28 U.S.C. §§ 1343, 2201, 2202, 2281, 2284 and 42 U.S.C. § 1983, and prays for the convening of a three-judge court under 28 U.S.C. § 2281, and for declaratory and injunctive relief in all three counts of their complaint.

Plaintiffs allege that the statutory wording "but excluding abortion" contained in RSMo 431.061[1] (Count I), "shall not include abortions unless such abortions are medically indicated" contained in RSMo 208.152 (Count II) and "pregnancy" contained in RSMo 431.061 (Count III) are unconstitutional. Plaintiffs allege that the above statutory wording in each count is vague and uncertain, deprives the plaintiffs and their patients of the right to privacy, deprives plaintiffs of their right to practice medicine according to the highest standards of medical practice, deprives plaintiffs' patients of the fundamental right of a woman to determine for herself whether to bear children, infringes upon plaintiffs' right to render and their patients'

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[1] 431.061. *Minors, treatment of certain conditions and diseases authorized.* Any physician, surgeon, any institution or facility of the state department of health, a municipal health department, or any public or private hospital may provide examination, treatment, hospitalization, medical and surgical care for any person under the age of twenty-one years, for;
(1) Pregnancy, but excluding abortion;
(2) Veneral disease;
(3) Drug or substance abuse including those referred to in chapter 195, RSMo 1969.

right to receive safe and adquate medical advice and treatment, deprives plaintiffs and their patients of the equal protection of the law and due process of law, and constitutes state interference with the abortion decision, all of which is in violation of the United States Constitution.

The contentions relied upon by the defendant State Board to sustain its motion to dismiss Counts I and III may be summarized as follows:

(1) Plaintiffs failed to state a claim upon which relief can be granted.

(2) The State Board is not a proper party defendant.

(3) Plaintiffs failed to allege the existence of a "controversy".

(4) Plaintiffs failed to allege enforcement by the State Board of the challenged statute and therefore the court should abstain from interpreting the state statute.

(5) There is relief available to plaintiffs in state courts and agencies.

The grounds relied upon by defendant Singleton to sustain his motion to dismiss Count II may likewise be summarized as follows:

(1) The declaratory relief prayed for does not constitute a "case or controversy ripe" for determination by this Court.

(2) Plaintiffs lack standing to litigate the constitutional questions presented.

(3) Injunctive relief cannot be granted in that the plaintiffs are not susceptible to irreparable harm by virtue of enforcement of the challenged statute.

(4) Plaintiffs have not exhausted administrative remedies.

(5) Plaintiffs could not personally suffer harm for which relief can be granted under 42 U.S.C. § 1983.

COUNT I

[1] RSMo 431.061 (see Footnote 1), which plaintiffs seek to attack in Counts I and III, was enacted in 1971 by the Missouri General Assembly as Section 1 of House Bill 73 and must be read and construed in connection with RSMo 431.062[2] and 431.063,[3] which were Sections 2 and 3 of House Bill 73. Mitchem v. Perry, 390 S.W.2d 600, 603 (Mo.App. 1965). When so read and construed it is apparent that RSMo 431.061 only relates to minors' ability to contractually bind themselves to pay for medical treatment for pregnancy, venereal disease and drug abuse. It is true that under RSMo 431.061(1) the treatment for pregnancy

[2] 431.062. *Minor cannot disaffirm contract, when—parents or guardian not liable, exception—disclosure by physician authorized, when*
Whenever a minor is examined, treated, hospitalized, or receives medical or surgical care under section 461.061:
(1) His consent shall not be subject to disaffirmance or revocation because of minority;
(2) The parent, parents, or legal guardian shall not be liable for payment for such care unless the parent, parents, or legal guardian has expressly agreed to pay for such care;
(3) A physician or surgeon may, with or without the consent of the minor patient, advise the parent, parents, or legal guardian of the examination, treatment, hospitalization, medical and surgical care given or needed if the physician or surgeon has reason to know the whereabouts of the parent, parents, or legal guardian. Such notification or disclosure shall not constitute libel or slander, a violation of the right of privacy or a violation of the rule of privileged communication. In the event that the minor is found not to be pregnant or not afflicated wih a venereal disease or not suffering from drug or substance abuse, then no information with respect to any appointment, examination, test or other medical procedure shall be given to the parent, parents, legal guardian or any other person.

[3] 431.063. *Minor's consent legally binding, when*
Any person, under the age of twenty-one years, who is examined, treated, hospitalized or who receives medical or surgical treatment under sections 431.061 to 431.063 may give legal consent, and no person who administers such medical or surgical treatment shall be liable, except for negligence, for treating such minor without advising the parent, parents, or legal guardian.

for which an unmarried minor may contractually bind herself excludes abortions. The effect of this exclusion is simply to leave the law unchanged as it relates to contracts for abortion. That is to say that a minor may not be held contractually liable for the cost of receiving an abortion unless she ratifies the debt contracted after she reaches majority. RSMo 431.060. This does not constitute a prohibition against giving abortions to minors.

[2] Neither the statute under attack, RSMo 431.061, nor the two statutes enacted as part of the same bill (RSMo 431.062 and 431.063) provide any sanctions for the performance of an abortion on an unmarried minor without parental consent. In fact, Missouri does not in light of Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973); Doe v. Bolton, 410 U.S. 179, 93 S.Ct. 739, 35 L.Ed.2d 201 (1973), and Rodgers v. Danforth, Civ. No. 18360—2 (W.D.Mo.),[4] affirmed 1973, 414 U.S. 1035, 94 S.Ct. 534, 38 L.Ed.2d 327, at this time have sanctions for abortions performed on adults or minors as long as the abortionist is a licensed physician.

Plaintiffs contend in their affidavits filed in opposition to the defendants' motions to dismiss that they fear reprisals from the defendant State Board, in that the State Board may discipline them under RSMo 334.100 based upon their past performances of abortions and anticipated future performances of abortions upon unmarried minors, without parental consent, on a non-emergency basis. RSMo 334.100 provides, in part, that a licensee may be placed on probation or the license suspended or revoked when a physician is found guilty of unprofessional or dishonorable conduct. That statute then continues, stating:

"Without limiting the foregoing general language,

[4] See Appendix.

the following specifications shall be deemed unprofessional and dishonorable conduct within the meaning of this section:

* * * * * *

"(3) Committing an unlawful abortion;"

As pointed out above, since the decisions in *Wade, Bolton* and *Rodgers,* supra, and the failure of the Missouri Legislature to enact a statute within permissible limits of those cases, Missouri no longer has any prohibition against abortion, when it is performed by a physician. Therefore, any abortion performed by a licensed physician is not an unlawful abortion. What plaintiffs seek in reality is a declaratory judgment by this Court that the performance of an abortion by a licensed physician on an unmarried minor without parental consent on a non-emergency basis is not unprofessional and dishonorable conduct under RSMo 334.100.

In order for this Court to rule on the constitutionality of the statutory wording "but excluding abortion" in RSMo 431.061 under the Declaratory Judgment Act, 28 U.S.C. § 2201, as prayed for in plaintiffs' complaint, there must exist an "actual controversy" between the parties and without such actual controversy this Court is without power to grant declaratory relief. Maryland Casualty Co. v. Pacific Coal & Oil Co., 312 U.S. 270, 61 S.Ct. 510, 85 L.Ed. 826 (1941). In Golden v. Zwickler, 394 U.S. 103, 108, 89 S.Ct. 956, 959, 22 L.Ed.2d 113 (1969), the Supreme Court said:

> "'[T]he federal courts established pursuant to Article III of the Constitution do not render advisory opinions. For adjudication of constitutional issues "concrete legal issues, presented in actual cases, not abstractions," are requisite. This is as true of declaratory judgments as any other field.' United Public Workers

> of America v. Mitchell, 330 U.S. 75, 89, [67 S.Ct. 556, 564, 91 L.Ed. 754] (1947). "The difference between an abstract question and a "controversy" contemplated by the Declaratory Judgment Act is necessarily one of degree, and it would be difficult, if it would be possible, to fashion a precise test for determining in every case whether there is such a controversy. Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.' Maryland Casualty Co. v. Pacific Coal & Oil Co., 312 U.S. 270, 273, [61 S.Ct. 510, 512, 85 L.Ed. 826] (1941)."

[3, 4] From the foregoing, it is clear that the ingredients necessary to sustain a complaint for declaratory judgment are: (a) a substantial controversy; (b) between parties having adverse legal interests; and (c) the controversy must possess "immediacy and reality." The plaintiffs here do not claim that they have ever been threatened with disciplinary action by the State Board or that disciplinary action by the State Board is even likely. The most that can be said of the plaintiffs is that they feel uneasy or inhibited in performing abortions on minors without parental consent. The mere possibility or even probability that the plaintiffs may sometime in the future be adversely affected by a disciplinary action of the State Board not yet threatened does not create an "actual controversy" which is a prerequisite created by the clear language of the Declaratory Judgment Act. Garcia v. Brownell, 236 F.2d 356 (9th Cir. 1956), cert. denied, 362 U.S. 963, 80 S.Ct. 880, 4 L.Ed.2d 878 (1960).

COUNT II

In Count II plaintiffs challenge the constitutionality of the statutory wording, "shall not include abortions unless such abortions are medically indicated," contained in RSMo 208.152(12). The pertinent portions of RSMo 208.152 are as follows:

> "Benefit payments for medical assistance may be made on behalf of those eligible needy persons who are unable to provide for it in whole or in part, with any payments to be made on the basis of the reasonable cost of the care or reasonable charge for the services as defined and determined by the division of welfare unless otherwise hereinafter provided, for the following:
>
> • • • • • •
>
> "(12) Family planning services are defined by federal rules and regulations provided, however, that such family planning services shall not include abortions unless such abortions are medically indicated."

[5] As established by the above statute, the medical reimbursements for medical assistance in the area of "medically indicated" abortions are made on behalf of those eligible needy persons who are unable to provide for it in whole or in part. Since the medical payments are made "on behalf" of the needy individual, there can be no argument but that the welfare recipient is the intended beneficiary of this statutory section. It is the welfare recipients and not their physicians who by Federal Title 45, Public Welfare Chapter II, Social Rehabilitation Services (Federal Register, Vol. 38, No. 157, Wed., August 15, 1973) under part 205.10(a)(5) are granted a right to a hearing if their claims for medical reimbursement assistance are denied and it is the welfare recipients who are afforded the right to appeal such decisions through the administrative process

required by federal regulation and established under RSMo 208.156. This raises the question as to whether the plaintiffs have standing to litigate the constitutionality of the statute here in question.

Plaintiffs state in their affidavits filed in opposition to defendant Singleton's motion to dismiss that they have provided and anticipate providing abortions to welfare patients who are eligible for Medicaid payments for medical assistance, and that those patients who have submitted applications for such payments have been refused and that they anticipate future refusals by defendant Singleton based upon the challenged language in RSMo 208.152. Plaintiffs further state that such refusals by defendant Singleton deter plaintiffs from the practice of medicine in the manner they consider to be most expert and beneficial to their patients.

Plaintiffs cite Doe v. Scott, 321 F. Supp. 1385 (N.D. Ill. 1970); Roe v. Wade, supra, and Doe v. Bolton, supra, as authority for their contention that they have standing to litigate the constitutionality of RSMo 208.152. Doe v. Scott, supra, was an action for declaratory and injunctive relief brought to declare an Illinois criminal abortion statute unconstitutional. The plaintiff-physicians in *Scott* alleged that the existence of the Illinois criminal abortion statute interfered with and adversely affected their ability to conduct their medical practices with proper regard for their patients' best interests. The district court in *Scott,* 321 F.Supp. l.c. 1387-88 held:

> "[T]he physician-plaintiffs have standing to raise the claims of their patients even if we assume that no independent claim of theirs could withstand a motion for judgment on the pleadings."

The court in *Scott* cited Griswold v. Connecticut, 381 U.S. 479, 481, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965), and

Barrows v. Jackson, 346 U.S. 249, 257, 73 S.Ct. 1031, 97 L.Ed. 1586 (1953), as supporting authority for its decision that the plaintiff-physicians had standing to raise the claims of their patients with respect to the constitutionality of the Illinois abortion statute.

In Griswold v. Connecticut, supra, the appellant-physician had been convicted as an accessory for giving information and medical advice on how to prevent conception in violation of a Connecticut statute making it a crime for any person to use any drug or article to prevent conception. In relation to the appellant-physician's standing, the Supreme Court said, 381 U.S. l. c. 481, 85 S.Ct. l. c. 1679:

> "We think that appellants have standing to raise the constitutional rights of the married people with whom they had a professional relationship. Tileston v. Ullman, 318 U.S. 44 [63 S.Ct. 493, 87 L.Ed. 603], is different, for there the plaintiff seeking to represent others asked for a declaratory judgment. In that situation we thought that the requirements of standing should be strict, lest the standards of 'case or controversy' in Article III of the Constitution become blurred. Here those doubts are removed by reason of a criminal conviction for serving married couples in violation of an aiding-and-abetting statute. Certainly the accessory should have standing to assert that the offense which he is charged with assisting is not, or cannot constitutionally be a crime."

In Barrows v. Jackson, supra, a white defendant who was a party to a racially restrictive covenant was being sued for damages by the covenantors because she had conveyed her property to Negroes. The defendant was allowed to raise the issue that enforcement of the covenant violated the rights of prospective Negro purchasers to equal protection of the law, although no Negro was a party to the suit.

The Supreme Court said, 346 U.S. l. c. 255-256, 73 S.Ct. l. c. 1034:

> "Ordinarily, one may not claim standing in this Court to vindicate the constitutional rights of some third party. Reference to this rule is made in varied situations. See Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 149-154 [71 S.Ct. 624, 636-639, 95 L.Ed. 817] (concurring opinion). The requirement of standing is often used to describe the constitutional limitation of the jurisdiction of this Court to 'cases' and 'controversies'. See Coleman v. Miller, 307 U.S. 433, 464 [59 S.Ct. 972, 986, 83 L.Ed. 1385] (concurring opinion). Apart from the jurisdictional requirement, this Court has developed a complementary rule of self-retraint for its own governance (not always clearly distinguished from the constitutional limitation) which ordinarily precludes a person from challenging the constitutionality of state action by invoking the rights of others. See Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 346-348 [56 S.Ct. 466, 482-483, 80 L.Ed. 688] (concurring opinion). The common thread underlying both requirements is that a person cannot challenge the constitutionality of a statute unless he shows that he himself is injured by its operation. This principle has no application to the instant case in which respondent has been sued for damages totaling $11,600, and in which a judgment against respondent would constitute a direct, pocketbook injury to her."

The Supreme Court went on to say in relation to its rule on standing, l. c. 257, 73 S.Ct. l. c. 1035:

> "This is a salutary rule, the validity of which we reaffirm. But in the instant case, we are faced with a unique situation in which it is the action of the state *court* which might result in a denial of constitutional

rights and in which it would be difficult if not impossible for the persons whose rights are asserted to present their grievance before any court. Under the peculiar circumstances of this case, we believe the reasons which underlie our rule denying standing to raise another's rights, which is only a rule of practice, are outweighed by the need to protect the fundamental rights which would be denied by permitting the damages action to be maintained. Cf. Quong Ham Wah Co. v. Industrial Acc. Comm., 184 Cal. 26, 192 P. 1021, 12 A.L.R. 1190.

Roe v. Wade, supra, and Doe v. Bolton, supra, the other two cases relied upon by plaintiffs in the instant case to support their contention that they have standing, are somewhat similar in that they both attack the constitutionality of state criminal abortion statutes. In Roe v. Wade, supra, the Supreme Court held that plaintiff-physician in *Wade* was under indictment for violating the Texas criminal abortion statute and the Supreme Court dismissed his complaint and remitted him to his defenses in the state criminal proceedings against him where he could raise the constitutionality of the statute under which he was charged. In Doe v. Bolton, supra, the plaintiff-physicians alleged that the Georgia criminal abortion statute chilled and deterred them from practicing their profession. The Supreme Court in holding that the plaintiff-physicians had standing said, 410 U.S. l. c. 188, 93 S.Ct. l. c. 745:

> "[T]he physician-appellants, who are Georgia-licensed doctors consulted by pregnant women, also present a justiciable controversy and do have standing despite the fact that the record does not disclose that any one of them has been prosecuted or threatened with prosecution, for violation of the State's abortion statutes. The physician is the one against whom these criminal

> statutes directly operate in the event he procures an abortion that does not meet the statutory exceptions and conditions. The physician-appellants, therefore, assert a sufficiently direct threat of personal detriment. They should not be required to await and undergo a criminal prosecution as the sole means of seeking relief."

In the instant case, the plaintiff-physicians have not been convicted as accessories to a criminal offense as the plaintiff-physician was in Griswold v. Connecticut, supra. The plaintiff-physicians here do not present a unique situation such as was presented to the court in Barrows v. Jackson, supra, and they are not being sued for damages as in *Barrows,* where a judgment against them would constitute a direct pocketbook injury. Also in *Barrows,* the Supreme Court felt it would be difficult if not impossible for the Negroes whose rights were being asserted by the defendant therein to present their grievance before any court. This is not the situation here for in the instant case the persons whose rights the plaintiffs are really asserting (their patients who are eligible to receive Medicaid payments) have a statutory right to a hearing before a state agency as stated above where they can present their grievance and if not satisfied they can carry their grievance on to the appropriate court. Neither are the plaintiff-physicians herein subject to the direct operation of any criminal anti-abortion statute as the plaintiff-physicians were in Roe v. Wade, supra, and Doe v. Bolton, supra, and, therefore, cannot assert a sufficiently direct threat of personal detriment as the plaintiff-physicians in those cases could. The only possible detriment the plaintiffs in the instant case can suffer under their contentions in Count II is the possibility that their patients who are eligible for medical assistance under RSMo 208.152 will not be able to pay for the services the plaintiffs have rendered to them in giving them an abortion operation.

Keeping in mind that it is the welfare recipient in whose behalf medical assistance payments under RSMo 208.152 are made and that it is the welfare recipients and not their physicians who have a right to a hearing if their medical assistance claims are denied, and that the plaintiff-physicians are not prohibited from performing abortions, this Court finds that the standing requirement of Flast v. Cohen, 392 U.S. 83, 102, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968), that there be a logical nexus between the status asserted by the plaintiffs and the claim they seek to have adjudicated is not satisfied by the litigative posture of the plaintiff-physicians herein, and, therefore, they lack standing to challenge the constitutionality of the statute in question here. This is not to say that the issue the plaintiffs bring to this Court is not justiciable, but is only to say that these plaintiffs are not the proper parties to request an adjudication. Flast v. Cohen, supra.

COUNT III

[6] Plaintiffs contend that the word "pregnancy" in RSMo 431.061 is vague and ambiguous and *if* it is interpreted, construed and applied to exlude the giving, prescribing and providing of contraceptive devices to minors without parental consent then it would be subject to all of the constitutional defects alleged in Count I.

It is apparent from the plaintiffs' pleadings in Count III that the plaintiffs do not present an actual controversy in Count III as required under the Declaratory Judgment Act. Therefore, this Court's reasoning in relation to Count I and the law applied there equally applies here in Count III.

In view of this Court's findings it is not necessary to discuss the defendants' remaining contentions.

Accordingly, for the reasons above stated, the motion of the defendant, State Board, to dismiss Counts I and III for lack of controversy, and the motion of defendant Singleton to dismiss Count II for lack of standing, are sustained.

The Clerk of the Court will prepare and enter the proper order dismissing the case.

APPENDIX

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF
MISSOURI WESTERN DIVISION

Filed May 18, 1973

SAMUEL L. RODGERS, M. D., et al., *Plaintiffs,* vs. JOHN C. DANFORTH, Attorney General of the State of Missouri, et al., *Defendants.*	Civil Action No. 18360-2

MEMORANDUM OPINION AND JUDGMENT

This complaint attacked the constitutionality of Missouri criminal abortion statutes. The basic statute, Section 559.100, Missouri Revised Statutes, 1959, as amended, declares the production of all miscarriages and abortions a felony "unless the same is necessary to preserve her (the mother's) life or that of an unborn child," with different penalties for the death of a "quick" and "unquick" foetus. The complaint sought both declaratory and injunctive relief.

Because of the prayer for injunctive relief, a three-judge federal court was convened under the provisions of Title 28, U.S.C. Section 2281.

A motion to intervene was filed by "Baby Doe" and an M.D. on behalf of all unborn children "who will or may be adversely affected by the action before this court."

The defendant named in the original complaint was

the Attorney General of Missouri, in his official capacity, and later, by an amended complaint, the Prosecuting Attorney of Jackson County, Missouri, was added as a party defendant, who was made the class representative of all prosecuting attorneys in Missouri, by subsequent court order.

The Court then granted the motion of the defendants to dismiss this action on the sole grounds of abstention, and ordered the cause dismissed without prejudice. The plaintiffs appealed this judgment to the Supreme Court.

While the appeal was pending, that Court decided the cases of Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), and Doe v. Bolton, 410 U.S. 179, 93 S.Ct. 739, 35 L.Ed.2d 201 (1973), and remanded this case to this Court "for further consideration in light of" these two cases.

After the remand, the defendants filed an answer denying the existence of a justiciable controversy and alleging that the attacked statutes are justified by compelling state interests, to-wit: the protection of human life and the protection of potential human life. The answer requested a jury trial under either Rule 38 or 39, Federal Rules of Civil Procedure.

The plaintiffs filed a motion for summary judgment based on affidavits of two of the plaintiffs who are medical doctors, and a third person who is Executive Director of Suicide Prevention, Inc., a United Fund agency in St. Louis.

The denfendant Attorney General has filed lengthy suggestions in opposition to the motion for summary judgment, accompanied by the affidavit of an M.D. which controverts affidavits filed by plaintiffs as to the "chilling effect" of Missouri abortion statutes on the practice of their profession by doctors in Missouri.

The argument of the Attorney General of Missouri is that in Roe v. Wade, *supra,* the Supreme Court did not determine "whether an unborn child is human life"; that this is a question of fact which can only be determined by triers of the fact after hearing evidence from expert witnesses; that if human life exists from the moment of conception the State has a compelling interest to protect this life; and that summary judgment cannot be granted when such an issue of fact exists.

This Court finds that the teachings of Roe v. Wade, *supra,* completely contradict this argument. The opinion stated that the "existence of life from the moment of conception" is the official belief of the Catholic Church, of many non-Catholics, and "a view strongly held . . . by many physicians."

But, the opinion states, "We need not resolve the difficult question of when life begins." No statement could be clearer. Whether life begins at conception, at quickening, at viability, or at birth (the alternatives discussed in the opinion), the Court held that resolution of this question would not affect the decision.

The defendants' prayer for trial of the factual issue of "when life begins" is denied.

The lack of justiciable controversy issue raised by the answer is fully discussed and ruled upon in the case of Doe v. Bolton, *supra.* That case holds:

> "We conclude, however, that the physician-appellants, who are Georgia-licensed doctors consulted by pregnant women, also present a justiciable controversy and do have standing despite the fact that the record does not disclose that any of them has been prosecuted, or threatened with prosecution, for violation of the State's abortion statutes."

Four of the plaintiffs in this case are eminent Missouri-licensed obstetricians and gynecologists, and their standing as plaintiffs, under the teachings of Doe v. Bolton cannot be questioned.

In Roe v. Wade the Court quoted from the Texas statute it found unconstitutional and stated, "Similar statutes are in existence in a majority of the States.[2]" Footnot 2 lists "Mo.Rev. § 559.100 (1969)."

There can be no question that this Missouri statute referred to in that opinion is unconstitutional under the teachings of the two Supreme Court cases which we were mandated to consider. The other two statutes attacked are based upon the validity of § 559.100 and must similarly be held unconstitutional. The plaintiffs' motion for summary judgment will be granted.

In both Roe v. Wade and Doe v. Bolton the Supreme Court affirmed the lower court's granting of a declaratory judgment and denial of injunctive relief, stating in both cases that the Court would assume that the state prosecutorial authorities would give full recognition and credence to the Court's judgment as to the unconstitutionality of the State statute.

In this case the defendant Attorney General has not given "full recognition" or "credence" to the ruling of the Supreme Court. It does not appear that a declaratory judgment in this case, in view of the Attorney General's publicly stated position, will suffice to guarantee the constitutional rights of pregnant women and their consulting doctors as decided by the Supreme Court, and, it is therefore

Ordered that the defendant Attorney General of the State of Missouri, and the defendant class of all Prosecuting Attorneys in the State of Missouri be, and they hereby are, enjoined from instituting any criminal prosecutions, com-

plaints for warrants, or complaints for search warrants under, or by authority of, unconstitutional Sections 542.380(3), 559.100, or 563.300, Revised Statutes of Missouri, 1969. Costs taxed to defendant Attorney General in his official capacity.

(s)
Floyd R. Gibson, Circuit Judge

(s)
Elmo B. Hunter, District Judge

(s)
William R. Collinson, District Judge

Supreme Court, U. S.
FILED
JUN 6 1975
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

..... TERM, 1975

No. 74-1393

THOMAS E. SINGLETON,
Petitioner,

vs.

GEORGE J. L. WULFF, JR., M.D.,

and

MICHAEL FREIMAN, M.D.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITIONER'S SUPPLEMENTAL BRIEF

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UNITED STATES COURT OF APPEALS
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PETITIONER'S SUPPLEMENTAL BRIEF

The petitioner, Thomas E. Singleton, respectfully submits to this Court, pursuant to Supreme Court Rule 24(5), this supplemental brief in support of the proposition that the Supreme Court should grant a writ of certiorari to the United States Court of Appeals for the Eighth Circuit in this matter.

The decision below conflicts with the decision of another court of appeals as to the authority of the Court of Appeals for the Eighth Circuit to determine the Missouri State statute herein involved to be unconstitutional absent a determination on the merits of that issue by a three-judge district court.

On April 28, 1975, the United States Court of Appeals for the Sixth Circuit handed down its opinion in *Roe, et al.* v. *Ferguson,* Sixth Circuit Number 74-2195. The attorneys for the petitioner were not able to study *Roe* v. *Ferguson* before the petition for writ of certiorari was sent to the printer for ultimate distribution to the Supreme Court and opposing counsel. The petitioner respectfully submits that the Court should consider *Roe* v. *Ferguson* and grant the writ because there is a direct conflict between the decision of the Sixth Circuit and the opinion below.

In its opinion below, the Eighth Circuit determined that it had jurisdiction to hold Section 208.152(12), RSMo Supp. 1973, unconstitutional even though the three-judge district court had not passed upon the constitutionality of that statute. The pertinent portions of the Eighth Circuit's opinion, which are printed on pages 26 and 27 of the petition for writ of certiorari, are set forth completely below:

> "III. THIS COURT'S JURISDICTION TO REACH THE MERITS
>
> We are urged by appellants to reach the merits of this case rather than remand to the three-judge court. This question is not without its difficulty. There is little direct authority for the propriety of our reaching the merits. Nevertheless, we are satisfied that under the circumstances of this case and in the interest of judicial economy and logic we should now address the merits of this controversy.

Of course, the three-judge court has not determined the merits. This court is not generally a court of original jurisdiction. Even so, there is authority for the proposition that when a case is properly before a Court of Appeals, the court has the power "to do what plainly ought to be done." *Mercury Motor Express, Inc.* v. *Brinke,* 475 F.2d 1086, 1091 (5th Cir. 1973), *citing* 9 Moore's Federal Practice § 110.25[1] (2d ed. 1972).

In reaching the merits of a case which was before the court pursuant to an interlocutory appeal under 28 U.S.C. § 1292(b) this court said:

> We adhere to the proposition that it would be improper to consider "grave constitutional questions" where there exists "reasonable likelihood" that further proceedings could help clarify the issues. *Borden's Farm Products Co.* v. *Baldwin,* 293 U.S. 194, at 213, 55 S. Ct. 187, 79 L.Ed. 281. However, in the present proceeding no further pleadings or evidence is necessary for "refinement or clarification of the issues." *United States* v. *Petrillo,* 332 U.S. 1, 67 S. Ct. 1538, 91 L.Ed. 1877; *United States* v. *Fabro, Inc.,* M.D. Ga., 206 F. Supp. 523. And we should dispose of all controversies "as expeditiously as is consistent with proper judicial administration." *Turner* v. *City of Memphis,* 369 U.S. 350, 82 S. Ct. 805, 7 L.Ed.2d 762.

Board of Managers of Ark. Tr. Sch. for Boys v. *George,* 377 F.2d 228, 231 (8th Cir. 1967). In addition, Mr. Justice Clark in writing for the Supreme Court has indicated that effective judicial administration requires disposal of the case on appeal rather than remanding, where the point to be decided is clear. *Levin* v. *Mississippi River Fuel Corporation,* 386 U.S. 162, 170 (1967), 87 S. Ct. 927, 932.

It might be argued that the above authority, though persuasive, should not apply in the instance of an appeal to the Court of Appeals from a statutory three-judge court.

The Supreme Court has made it clear that the three-judge court mandate must be construed quite narrowly. "Congress established the three-judge court apparatus for one reason: to save state and federal statutes from improvident doom, on constitutional grounds, at the hands of a single federal district judge." *Gonzalez, supra* 43 Law Week 4027.

For this court to get to the heart of the matter and dispose of this case on the merits will not conflict with the policy behind the statute. Indeed, we think this case is particularly proper for disposition in this court since "[w]hile § 2281 calls for three judges to enjoin a statute 'upon the ground' of its 'unconstitutionality,' we [the Supreme Court] have held that three judges are not in fact necessary where the unconstitutionality of the statute is obvious and patent * * *." *Gonzalez, supra* at 4027, footnote 14, *citing Bailey* v. *Patterson,* 369 U.S. 31 (1962).

> The statute in question is obviously unconstitutional, and it is our view that the case might well have been decided by one federal judge. *See generally Roe* v. *Norton,* 380 F. Supp. 726, 728 (D. Conn. 1974). Accordingly, we choose to make final determination of this case."

The Sixth Circuit considered the same problem but reached a wholly different result. After determining that an Ohio statute, similar to the Missouri statute herein in question, restricting the payment of Medicaid funds to those abortions necessary to preserve the mental or physical health of the pregnant woman, was not in conflict with the

pertinent federal statutory provisions of the Social Security Act, the Sixth Circuit considered whether it had jurisdiction to reach the constitutionality of that Ohio statute absent a finding on that issue by a three-judge district court. The Sixth Circuit stated as follows:

> "We turn to plaintiffs' contention that the Ohio state policy is constitutionally impermissible. Since plaintiffs' contentions were presented to the court below and appear in the record, it is argued that we should consider the constitutional issues even though the district court pretermitted them. It is generally true that an appellate court may consider grounds other than those relied upon by the district court. *United States* v. *American Railway Express Co.,* 265 U.S. 425, 435 (1924); *Dandridge* v. *Williams,* 397 U.S. 471, 475 n. 6 (1970). Yet, this procedure is necessarily inapplicable in a case in which a three-judge court is required under 28 U.S.C. Section 2281 because an injunction is sought to restrain the enforcement of a state statute on grounds of its unconstitutionality.
>
> We are unable to agree that this case falls within the exception to the application of Section 2281 which has been carved out by the courts in situations in which the constitutional issue has been clearly settled or resolved. This exception to the three-judge court requirement was expressed in *Board of Supervisors of La. St. U. & A. & M. College* v. *Ludley,* 252 F.2d 372, 376 (5th Cir. 1958), *cert. denied,* 358 U.S. 819:
>
> > There can be no real dispute where each separate element on which the state relies to support the constitutionality of a statute has been clearly put to rest by the Supreme Court contrary to the contention of the state. *Cf. Goosby* v. *Osser,* 405 U.S. 512, 518 (1973).

Although there have been a number of lower court decisions holding state statutes similar to the Ohio law unconstitutional, it cannot be said that the issue has been put to rest by the Supreme Court. In *Roe* v. *Wade,* 410 U.S. 113 (1973), and *Doe* v. *Bolton,* 40 U.S. 179 (1973), the Supreme Court condemned state action infringing the right to have an abortion. In those cases the Supreme Court did not consider the question of payment of expenses for abortion whether nontherapeutic or otherwise. *We find ourselves, therefore, in disagreement with the Eighth Circuit's ruling in* **Wulff** *v.* **Singleton,** *508 F.2d 1211 (8th Cir. 1974), that the unconstitutionality of this type of statute is so 'obvious and patent' as to obviate the need for a three-judge court.*

Plaintiffs further argue that we should reach the issues in this case since '(t)he policy behind the three-judge court will be adequately implemented if the court of appeals entertains the constitutional claims.' Suffice it to say that it is not the proper function of this Court to second guess Congress as to the appropriate occasion for requiring a three-judge district court.

Neither does this case come within the exception to the three-judge court requirement which arises when erroneous administrative action taken pursuant to an otherwise constitutional statute is challenged. See *Phillips* v. *United States,* 312 U.S. 246 (1974). It is unquestioned that what originally was an informal policy of the state auditor is now compelled by a state statute.

Our refusal to consider the merits of the constitutional issue presented for review does not mean that the claim is so insubstantial as not to require the impaneling of a three-judge court. Although there is judicial authority that statutes similar to the Ohio

statute are violative of the equal protection clause of the federal Constitution, the issue of substantiality is one to be determined in the first instance by the district judge in whose court the complaint is filed. In the present case, the district judge has already determined that the constitutional claim is not frivolous or insubstantial. We are of the opinion, therefore, that the action must be remanded to the district court for the convening of a three-judge district court." (Emphasis added).

For the convenience of the court, petitioner is attaching the opinion of the Sixth Circuit in *Roe et al.* v. *Ferguson,* as Appendix I to this Supplemental Brief.

There is a direct conflict between the Sixth Circuit and the Eighth Circuit as to the jurisdiction of the United States Court of Appeals to reach the merits on the respondent's constitutional claim in the absence of a determination thereon, pursuant to 28 U.S.C. Section 2281, by a three-judge district court. For that reason, and because the United States Supreme Court has not as of yet ruled that a state must make Medicaid payments for non-therapeutic abortions, this Court should grant certiorari and require that the Eighth Circuit remand this case for determination by a three-judge district court.

Respectfully submitted,

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APPENDIX I

No. 74-2195

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

RACHEL ROE, ET AL., *Plaintiffs-Appellees,* v. JOSEPH T. FERGUSON, *Defendant-Appellant.*	APPEAL from the United States District Court for the Southern District of Ohio, Eastern Division.

Decided and Filed April 28, 1975.

Before: PECK and MILLER, Circuit Judges, and HERMANSDORFER,* District Judge.

MILLER, Circuit Judge. The district court held the Ohio statutory provision (Ohio Rev. Code, Sec. 5101.55(c)) and administrative rulings thereunder, prohibiting the use of state or local funds to pay for an abortion unless the abortion was necessary to preserve the life or physical or mental health of the pregnant woman, to be in conflict with the federal Social Security Act. 42 U.S.C. § 1396a. Enforcement of the Ohio statute and administrative policy was accordingly enjoined by the court's judgment entered September 16, 1974.[1]

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* Honorable H. David Hermansdorfer, Judge, United States District Court for the Eastern District of Kentucky, sitting by designation.

[1] It has been recognized that "the joining in the complaint of a non-constitutional attack along with the constitutional one does not dispense with the necessity to convene" a three-judge court in an action to enjoin enforcement of a state statute. *Florida Lime Growers* v. *Jacobsen*, 362 U.S. 73, 80 (1960). However, the practice of a single judge resolving the

Previously, on February 14, 1973 in *Doe* v. *Brown*,[2] the district court for the Southern District of Ohio, had nullified on constitutional grounds the Ohio criminal law proscribing the performance of certain abortions. Nevertheless, on February 21, 1974, defendant Ferguson, Auditor of the State of Ohio, wrote the Director of the Ohio Department of Welfare, announcing the policy that the auditor would not sign warrants for any vouchers arising from the Ohio Medicaid program from physicians seeking reimbursement for "any Elective Abortion bills."[3] Subsequently, the state statute prohibiting the use of state or local public funds to pay for abortions not "necessary to preserve the life or physical or mental health" of the pregnant woman, became law on June 17, 1974.[4] This law was to have taken effect on September 16, 1974, but was declared void by the district court in the present case.

The plaintiffs challenging Ohio's policy and statute, may be classified in four groups: pregnant welfare recipients, physicians who perform abortions for welfare recipients, clinics in which physicians perform such abortions, and the

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statutory claim and thus possibly obviating the need for a three-judge court to consider the constitutional claim has been expressly approved by the Supreme Court as in compliance with 28 U.S.C. § 2281. *Hagans* v. *Lavine*, 415 U.S. 528, 543-45 (1974). The Supreme Court has gone so far as to vacate the judgment of the three-judge court in *Doe* v. *Wetsby*, 383 F.Supp. 1143 (D. South Dakota 1974), which held a statute similar to that of Ohio violative of the equal protection clause, without considering a statutory ground, and remand the case for further consideration in light of *Hagans* v. *Lavine*, *supra*. 43 U.S.L.W. 3499 (March 17, 1974). In any event, even under the law as it stood before *Hagans*, it would be permissible to appeal to the court of appeals from the final order of a single district judge, basing his decision solely on statutory grounds, in a case in which a state statute was attacked on the grounds that it was both unconstitutional and in conflict with a federal statute. *Lemke* v. *Farmers Grain Co.*, 258 U.S. 50, 52-53 (1922). This court thus has jurisdiction to hear this appeal.

[2] *See Doe* v. *Brown*, (Civil No. 73-46) (S.D. Ohio 1973).

[3] This policy was reaffirmed by a second letter sent on May 30, 1974, stating that certain classes of vouchers relating to elective abortions would not be paid under any circumstances while other classes of vouchers would be returned to the Department requesting a signed statement from the physician indicating the reason for the abortion procedure.

[4] Ohio Rev. Code Sec. 5101.55(c).

National Organization of Women. (NOW). In this action plaintiffs challenged the auditor's policy and the state statute as being inconsistent with the Social Security Act, Title XIX, 42 U.S.C. § 1396 *et seq.*, and also as being violative of the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution. The district court on September 16, 1974 sustained the motion of plaintiffs for summary judgment, finding that there was no disputed issue of material fact and that the state statute and policy were not as a matter of law in conformity with the mandatory provisions of the federal Social Security Act, 42 U.S.C. §§ 1396 *et seq.* By thus construing the federal statute as prohibiting states participating in the Medicaid program from distinguishing expenses for elective abortions from all other medical expenses, the court avoided the constitutional questions raised by plaintiffs.

Three issues are presented on appeal: (1) Whether the policy of the Ohio state auditor and Ohio Rev. Code, § 5101.55 (c), by restricting the payment of Medicaid funds to abortions necessary to preserve the mental or physical health of the pregnant woman, are in conflict with the provisions of the Social Security Act; (2) Whether the Ohio statute and policy violate the 9th and 14th amendments, thus providing an alternative ground for affirmance; and (3) Whether this Court has jurisdiction to consider the constitutional issues presented.

Although not raised by the parties, we first consider a preliminary issue of standing.[5] It may be judicially noticed that the outcome of this case can be of no immediate concern to the pregnant welfare recipients named as plaintiffs. However, at the date of the filing of the case there can be no dispute that these plaintiffs, as pregnant indigent women, presented a justiciable case or controversy and thus

---

[5] This case was not instituted as a class action and only the named plaintiffs are parties to the suit.

had standing to challenge the state statute and policy. *Roe* v. *Wade,* 410 U.S. 113, 124 (1973). The termination of plaintiffs' pregnancy cannot be considered to have rendered their case moot since the condition is capable of repetition and termination before future appellate review could be obtained. *Id.* at 125.

With regard to the standing of the plaintiff physicians, recent cases have settled the right of physicians in the practice of medicine to assert their constitutional rights to advise and perform abortions for indigent women. *Doe* v. *Bolton,* 410 U.S. 179, 187-89 (1973). *Crossen* v. *Breckenridge,* 446 F.2d 833, 839-40 (6th Cir. 1971). That plaintiff physicians in this case are not threatened with criminal prosecutions does not compel a different result. *Nyberg* v. *City of Virginia,* 495 F.2d 1342, 1344 (8th Cir. 1974); *Wulff* v. *Singleton,* 508 F.2d 1211 (8th Cir. 1974).

In view of our ruling as to the standing of the above mentioned plaintiffs, it is unnecessary to resolve the issue of the standing of the other plaintiffs. The issues are sufficiently and adequately presented by the plaintiffs Roe and Joe and plaintiff physicians. Nothing would be gained or lost by the absence or presence of the other plaintiffs as parties. *Roe* v. *Wade,* 410 U.S. 113 at 127 (1973); *Doe* v. *Bolton,* 410 U.S. 179 at 189 (1973).

Plaintiffs first contend, and the district court held, that the state statute and the policy of the state auditor are in conflict with the provisions and purposes of the Medical Assistance Program of the Social Security Act.[6] (Medicaid). Medicaid is a federal grant-in-aid project. A state's involvement is voluntary. For a state to receive federal monies, however, its implementation of the program must meet federal requirements. Title XIX of the Social Security Act establishes a comprehensive scheme of medical care

[6] 42 U.S.C. §§ 1396 *et seq.*

for the needy to be administered by the states and jointly funded by the federal and state governments. The Ohio statutes implementing the program extend medical assistance to all recipients of Aid to Families with Dependent Children (AFDC),[7] and other programs subsumed under Ohio Rev. Code § 5101.51 and Ohio Rev. Code, Chapter 5107.

For welfare recipients covered by the statutory scheme, Title XIX provides that states must provide the following minimal services: (1) inpatient hospital services; (2) outpatient hospital services; (3) other laboratory and x-ray services; (4) skilled nursing facility services, screening and diagnosis of children, and family planning services; and (5) physicians' services. 42 U.S.C. §§ 1396a(a)(13), 1936(a)(1)-(5).[8]

Plaintiffs argue that the abortion services excluded from coverage by the state of Ohio may properly fall within the definition of either physicians' services, inhospital services, outpatient services, or family planning services.

A number of courts have confronted the question whether a state's exclusion of Medicaid funds for abortions not required for the physical or mental health of the pregnant women can be overturned on purely statutory grounds. In *Roe* v. *Norton,* 380 F.Supp. 726 (D. Conn. 1974), it was argued that the federal statute should be construed to prohibit federal reimbursement for the expenses of an abortion unless the abortion is to prevent a detriment to the woman's physical or psychiatric health. The court there

[7] 42 U.S.C. §§ 601 *et seq.*

[8] A state may increase its Medicaid coverage to individuals in addition to the basic four categories of needy persons set forth in the Social Security Act. The services required to be supplied to these additional individuals are either the services falling under the five basic classifications or, alternatively, those services falling under any seven classifications of a longer list. *See* 42 U.S.C. §§ 1396a(10)(B), 1396a(13)(C), 1396(a)(1)-(17). There is no indication in this case, however, that Ohio has chosen any alternative classifications of services to provide certain needy individuals or that the plaintiffs in the case do not fall within the basic four categories of needy persons.

held that the language in the federal statute authorizing the reimbursement for "necessary medical services"[9] does not permit the exclusion of any abortions and that the state statutory restriction was therefore invalid. While the court based its holding on statutory grounds, it is evident that this approach was resorted to to "avoid doubts as to the constitutionality" of the state statute. 380 F.Supp. at 730.[10]

Other courts faced with the same question have refused to find that such state policies are in conflict with the federal statute, preferring to base their holdings on constitutional grounds. The earliest federal court decision came from New York in 1972. *Klein* v. *Nassau County Medical Center,* 347 F.Supp. 496 (E.D. N.Y. 1972) *aff'd sub nom. Ryan* v. *Klein,* 412 U.S. 924 (1973), *but vacated and remanded in light of Roe* v. *Wade* and *Doe* v. *Bolton,* 412 U.S. 925 (1973). The *Klein* court observed that "[m]edical assistance for abortion is not less 'necessary' because an election to bear the child would obviate that medical assistance and require instead other, more extensive and more expensive medical assistance," and that abortion services are thus "provided under the Medicaid program as 'necessary' medical assistance." *Id.* at 500. The court, however, refused to rely solely on statutory grounds, basing its decision primarily on the equal protection clause.

In a more recent case, *Doe* v. *Rose,* 499 F.2d 1112 (10th Cir. 1974), the abortion policy of the State of Utah, similar to the Ohio policy, was challenged on both statutory and constitutional grounds. Addressing itself first to the statutory ground of attack, the *Rose* court noted that the federal Medicaid statute makes no mention of abortion. The Court

[9] 42 U.S.C. § 1396.

[10] In this case, unlike *Roe* v. *Norton,* supra, defendant admits that Title XIX *permits* reimbursement of state payments for abortions not medically necessary. Defendant merely argues that Title XIX does not *require* a state to pay for such procedures.

thus felt that it lacked "specific guidelines as to whether Congress intended that abortions be covered by Medicaid and, if so, more critically, *which* abortions were to be covered by Medicaid benefits." 499 F.2d at 1114. Although it recognized that preference is to be given statutory, as opposed to constitutional, resolution of welfare controversies, the court nevertheless stated that:

> in light of the applicable statutes' complete silence on the abortion question, we prefer to dispose of the present appeal on constitutional grounds, rather than by any strained effort to show that the policy in question is, in effect, though not in so many words, prohibited by [the] federal . . . statute. *Id.* at 1115.[11]

A similar policy of the State of Pennsylvania limiting Medicaid reimbursement to "medically necessary" abortions was under attack in *Doe* v. *Wohlgemuth,* 376 F.Supp. 173 (W.D. Pa. 1974), *vacated and remanded on other grounds,* 505 F.2d 186 (3rd Cir. 1974). In that case a three-judge district court reasoned that, even if it should be assumed that abortion payments are clearly authorized under Title XIX of the Social Security Act, it must nevertheless be recognized that "Congress has given the States great latitude in establishing standards for the administration of the various plans, under the doctrine of a 'scheme of cooperative federalism.'" 376 F.Supp. at 184, *quoting* from *Dept. of Social Service* v. *Dublino,* 413 U.S. 405, 413 (1973).

The court analyzed the problem to be whether Pennsylvania had the latitude to determine when the performance of an abortion became a necessary medical service. Relying on *Dandridge* v. *Williams,* 397 U.S. 471 (1970), the *Wohlge-*

[11] The reason that a three-judge court was not convened in *Doe* v. *Rose* is that the policy under attack was an informal one not mandated by a state statute. The case thus fell within an exception to the three-judge court requirement. *See Phillips* v. *United States,* 312 U.S. 246 (1941).

muth court went on to hold that, in light of the latitude afforded states in setting the level of benefits and standards of need in welfare administration, the Pennsylvania regulation did not conflict with Title XIX of the Social Security Act.[12]

We are in accord with the decisions which have found no conflict between state restrictions of Medicaid payments to elective abortions and the provisions of the Social Security Act. There is no indication that Congress intended to require the furnishing of abortion services not required for the preservation of the health of the woman at a time when the performance of such abortions was illegal in most jurisdictions. In view of the disfavor shown toward abortions in other legislation, we are reluctant to infer that Congress intended to include required coverage for such controversial services without even mentioning the subject. When Congress passed the Family Planning Services and Research Act of 1970, 42 U.S.C. §§ 300a *et seq.* providing funds to states opting to participate in creating comprehensive programs of family planning services, abortion was specifically excluded as a means of family planning to be recognized under the Act. 42 U.S.C. § 300a-6.

In establishing the Legal Services Corporation system, Congress again provided that no funds of the Corporation could be used for legal assistance for those seeking to procure a nontherapeutic abortion. 42 U.S.C. § 2996f(b)(8).

In view of this evidence of the Congressional attitude toward abortion as a family planning technique or as an acceptable medical service in general, it is difficult to construe the silence of Congress in Title XIX as an endorsement of the view that non-therapeutic abortions are included in the "necessary medical services" required to be

[12] The *Wohlgemuth* court however, went on to find the Pennsylvania statute unconstitutional on equal protection grounds.

furnished by a state participating in Medicaid. This is not to say that Congress may constitutionally exclude such abortion services from coverage in the Medicaid program. In the absence of a legislative history indicating a contrary position, however, we cannot say that the statute itself prohibits such an exclusion.

We turn to plaintiffs' contention that the Ohio state policy is constitutionally impermissible. Since plaintiffs' contentions were presented to the court below and appear in the record, it is argued that we should consider the constitutional issues even though the district court pretermitted them. It is generally true that an appellate court may consider grounds other than those relied upon by the district court. *United States* v. *American Railway Express Co.*, 265 U.S. 425, 435 (1924); *Dandridge* v. *Williams*, 397 U.S. 471, 475, n.6 (1970). Yet, this procedure is necessarily inapplicable in a case in which a three-judge court is required under 28 U.S.C. § 2281 because an injunction is sought to restrain the enforcement of a state statute on grounds of its unconstitutionality.

We are unable to agree that this case falls within the exception to the application of § 2281 which has been carved out by the courts in situations in which the constitutional issue has been clearly settled or resolved. This exception to the three-judge court requirement was expressed in *Board of Supervisors of La. St. U. & A. & M. College* v. *Ludley*, 252 F.2d 372, 376 (5th Cir. 1958), *cert. denied* 358 U.S. 819:

> There can be no real dispute where each separate element on which the state relies to support the constitutionality of a statute has been clearly put to rest by the Supreme Court contrary to the contention of the state. *Cf. Goosby* v. *Osser*, 405 U.S. 512, 518 (1973).

Although there have been a number of lower court decisions holding state statutes similar to the Ohio law unconstitutional, it cannot be said that the issue has been put to rest by the Supreme Court. In *Roe* v. *Wade,* 410 U.S. 113 (1973), and *Doe* v. *Bolton,* 410 U.S. 179 (1973), the Supreme Court condemned state action infringing the right to have an abortion. In those cases the Supreme Court did not consider the question of payment of expenses for abortion whether nontherapeutic or otherwise. We find ourselves, therefore, in disagreement with the Eighth Circuit's ruling in *Wulff* v. *Singleton,* 508 F.2d 1211 (8th Cir. 1974), that the unconstitutionality of this type of statute is so "obvious and patent" as to obviate the need for a three-judge court.

Plaintiffs further argue that we should reach the constitutional issues in this case since "[t]he policy behind the three-judge court will be adequately implemented if the court of appeals entertains the constitutional claims." Suffice it to say that it is not the proper function of this Court to second guess Congress as to the appropriate occasion for requiring a three-judge district court.

Neither does this case come within the exception to the three-judge court requirement which arises when erroneous administrative action taken pursuant to an otherwise constitutional statute is challenged. *See Phillips* v. *United States,* 312 U.S. 246 (1974). It is unquestioned that what originally was an informal policy of the state auditor is now compelled by a state statute.

Our refusal to consider the merits of the constitutional issue presented for review does not mean that the claim is so insubstantial as not to require the impaneling of a three-judge court. Although there is judicial authority that statutes similar to the Ohio statute are violative of the

equal protection clause[13] of the federal Constitution, the issue of substantiality is one to be determined in the first instance by the district judge in whose court the complaint is filed. In the present case, the district judge has already determined that the constitutional claim is not frivolous or insubstantial. We are of the opinion, therefore, that the action must be remanded to the district court for the convening of a three-judge district court.

The judgment of the district court is therefore reversed and the action is remanded with directions that the district judge request the Chief Judge of the Circuit to impanel a three-judge court to hear and determine the constitutional issues presented.

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[13] *See Wulff* v. *Singleton,* 508 F.2d 1211 (8th Cir. 1974); *Doe* v. *Rose,* 499 F.2d 1112 (10th Cir. 1974); *Coe* v. *Westby,* 383 F.Supp. 1143 (D. South Dakota, 1974), *judgment vacated and case remanded* 43 U.S.L.W. 3499 (March 17, 1974); *Doe* v. *Wohlgemuth,* 376 F.Supp. 173 (W.D. Pa. 1974), *vacated and remanded on other grounds,* 505 F.2d 186 (3d Cir. 1974); *Klein* v. *Nassau County Medical Center,* 347 F.Supp. 496 (E.D. N.Y. 1972), *aff'd sub nom. Ryan* v. *Klein,* 412 U.S. 924 (1973), *but vacated and remanded in light of Roe* v. *Wade* and *Doe* v. *Bolton,* 412 U.S. 925 (1973).

Supreme Court, U. S.
FILED
AUG 21 1975
MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-1393

THOMAS E. SINGLETON,
Petitioner,

vs.

GEORGE J. L. WULFF, JR., M.D.
and
MICHAEL FREIMAN, M.D.,
Respondents.

ON WRIT OF CERTIORARI
To the United States Court of Appeals for the Eighth Circuit

Petition for Certiorari Filed May 6, 1975
Certiorari Granted June 23, 1975

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CHRONOLOGICAL LIST OF RELEVANT DISTRICT COURT DOCKET ENTRIES

Nov. 2, 1973—Complaint, with prayer for three-judge court, filed and summons issued.

Nov. 8, 1973—Designation, by Pat Mehaffy, Chief Judge of 8th Circuit United States Court of Appeals, of District Judge James H. Meredith, Circuit Judge William H. Webster, and Senior Judge Roy W. Harper to constitute three-judge court to hear and determine this action filed. Copy to Judges and attorney of record.

Nov. 14, 1973—Defendant State Board of Registration for the Healing Arts granted to Dec. 17, 1973, to file responsive pleading.

Nov. 16, 1973—Marshal's returns on service of summons/complaint filed (executed Nov. 7, 1973).

Nov. 26, 1973—Entry of appearance of John C. Danforth, Attorney General, State of Missouri, and Kermit W. Almstedt, Assistant Attorney General, State of Missouri, as attorneys for defendant Thomas E. Singleton, Chief, of Bureau of Medical Service, Division of Welfare, filed.

Motion of defendant, Thomas E. Singleton, Chief of Bureau of Medical Services, Division of Welfare, to extend time to file his answer to the complaint, and suggestion in support of said motion, filed.

Dec. 3, 1973—Order filed granting defendant Thomas E. Singleton, Chief of Bureau of Medical Service, Division of Welfare, through Dec. 17, 1973, in which to answer or otherwise plead to plantiffs' complaint. Carbon copy attorneys.

Dec. 14, 1973—Plaintiffs' interrogatories directed to defendant, Thomas E. Singleton, Chief of Bureau of Medi-

cal Services, Division of Welfare, State Department of Public Health and Welfare, filed.

Plaintiffs' interrogatories directed to defendant, The State Board of Registration for the Healing Arts, filed.

Dec. 14, 1973—Defendant State Board of Registration for the Healing Arts' motion to dismiss Counts I and III, and suggestions in support thereof, filed.

Dec. 17, 1973—Defendant, Thomas E. Singleton's motion to dismiss Count II of complaint, and suggestions in support thereof, filed.

Dec. 28, 1973—Plaintiffs' request for leave to court to file on or before Jan. 14, 1974 suggestions in opposition to each of defendants' respective motions to dismiss, said motions to be taken as submitted upon filing of plaintiffs' said suggestions or upon Jan. 14, 1974, whichever first occurs, filed, presented and granted.

Jan. 10, 1974—Defendant State Board of Registration for the Healing Arts' answers to interrogatories filed.

Jan. 11, 1974—Plaintiffs granted until Feb. 4, 1974, within which to respond to and submit memoranda of law in opposition to defendants' motions to dismiss.

Jan. 16, 1974—Defendant Thomas E. Singleton's answers to plaintiffs' interrogatories filed.

Defendant Thomas E. Singleton's objection to plaintiffs' interrogatory No. 4 filed.

Feb. 1, 1974—Plaintiffs granted to Feb. 18, 1974, in which to file responses to the respective motions to dismiss of defendants.

Feb. 19, 1974—Plaintiffs' memorandum in opposition to the motion to dismiss by defendant Thomas E. Singleton,

Chief of Bureau of Medical Services, Division of Welfare, State Department of Public Health and Welfare, filed.

May 31, 1974—Memorandum Opinion of Judges Webster, Meredith and Harper filed and Clerk directed to prepare and enter the proper order dismissing the case. Carbon copy to attorneys.

May 31, 1974—Order and Judgment filed. Cause dismissed. Carbon copy to attorneys.

June 17, 1974—Plaintiffs' Motion for Leave of Court to Add Parties Plaintiff(s) and Memorandum of Authorities in Support of Plaintiffs' Motion for Leave of Court to Add Parties Plaintiff(s) filed.

June 24, 1974—Defendant Singleton's Suggestions in Opposition to Plaintiffs' Motion for Leave of Court to Add Parties Plaintiff(s), filed.

June 24, 1974—Memorandum and Order, filed (Roy W. Harper, Judge), denying plantiffs' motion pursuant to Rule 21, Federal Rules of Civil Procedure, to add parties plaintiff(s) in Count II and denying plaintiff's request that Court grant time to seek out plaintiffs whose litigative posture would satisfy requirement of standing, etc. Copy of Memorandum and Order sent attorneys of Record.

June 24, 1974—Plaintiff's motion of June 17 and entire file submitted to Judge Harper.

June 28, 1974—Notice of Appeal of Plaintiffs George J. I. Wulff, Jr., M.D. and Michael Freiman, M.D. from an Order and Judgment dismissing Count II filed. Copy sent to defendant's attorneys. Certified copy of Appeal and 2 certified copies of Clerk's docket entries delivered to Clerk of United States Court of Appeals, 8th Circuit. Cash deposit of $250.00 made as bond.

Aug. 5, 1974—Copy of order of United States Court of

Appeals received and filed. That parties may proceed on the designated original record and appendix as required by Local Rule 11. Appendix and opening brief for appellants will be due to be served and filed on or before August 28, 1974.

Aug. 6, 1974—Plaintiff appellants' designation of record and statement of issues filed.

Aug. 13, 1974—Defendant-appellee's designation of record on appeal filed.

Aug. 14, 1974—Original file, paged and indexed, delivered to Clerk of United States Court of Appeals together with two certified copies thereof, and copy of minute entries.

Aug. 20, 1974—Letter from Frank Susman regarding designation of record. Copy delivered to United States Court of Appeals.

Jan. 28, 1975—Order filed refunding $250.00 bond.

Feb. 6, 1975—Order of United States Court of Appeals filed reversing decision of the three-judge panel.

March 31, 1975—Order filed. Portion of R.S.Mo. 208.152 (12) quote "that such family planning services shall not include abortions unless such abortions are medically indicated" is unconstitutional.

CHRONOLOGICAL LIST OF RELEVANT COURT OF APPEALS DOCKET ENTRIES

June 28, 1974—Docketing case.

June 28, 1974—Certified copies notice of appeal and docket entries in United States District Court.

June 28, 1974—Appellant's Motion for Injunction Pending Appeal.

June 28, 1974—Memorandum of Authorities in Support, etc.

July 1, 1974—Appearance for appellants.

July 8, 1974—Motion of appellee to dismiss appeal.

July 8, 1974—Suggestions in support of Motion to dismiss appeal.

July 8, 1974—Suggestions of appellee in Opposition to Motion for Injunction.

July 9, 1974—Original files from District Court (1 Volume Pleadings).

July 9, 1974—Appearance for appellee.

July 12, 1974—Appellant's suggestions in opposition to motion to dismiss.

July 12, 1974—Appellant's motion to dispense with appendix.

July 15, 1974—Appellee's Reply to Appellants Suggestions in Opposition to Appellee's Motion to Dismiss.

July 18, 1974—Order: Appellant's motion for injunction pending appeal denied.

July 18, 1974—Order: Appellee's motion to dismiss denied without prejudice to right of appellee to raise jurisdictional questions in brief and argument.

Aug. 2, 1974—Order: Parties to proceed on designated original record and appendix as required by Rule 11. Appendix and opening brief due Aug. 28.

Aug. 6, 1974—Appellants' Designation of Record and Statement of Issues.

Aug. 15, 1974—Appellees' Designation of record.

Aug. 15, 1974—Original and 2 copies designated record received from Clerk, District Court.

Aug. 28, 1974—Brief appellant with service. Original and 4.

Oct. 1, 1974—Brief appellee with service. Original and 4.

Oct. 15, 1974—Reply brief of appellant with service. Original and 4.

Oct. 22, 1974—Submitted to screening panel.

Nov. 21, 1974—Transferred to December Session.

Dec. 13, 1974—Argued and submitted to Judges Matthes, Ross and Stephenson. (Recorded). Appellant: Frank Susman; Appellee: Michael Boicourt, Assistant Attorney General; Conclusion by Susman.

Dec. 31, 1974—Opinion by Judge Stephenson (printed, published).

Dec. 31, 1974—Judgment of district court reversed; cause remanded to district court for proceedings consistent with this court's opinion.

Jan. 3, 1975—Petition for rehearing (Appellant). Original and 3.

Jan. 9, 1975—Order: Petition for rehearing denied; application for attorney fee denied (printed, published).

Jan. 20, 1975—Appellee's motion for stay of mandate.

Jan. 20, 1975—Appellee's motion for extension of time for issuance of mandate.

Jan. 20, 1975—Appellee's statement of intention to make application to Supreme Court for writ of certiorari.

Jan. 24, 1975—Appellants' opposition to appellees' motion for stay of mandate.

Jan. 31, 1975—Order: Motion for appellee for stay of mandate denied.

Feb. 5, 1975—Mandate issued.

Feb. 7, 1975—Receipt for mandate.

April 1, 1975—Certified transcript prepared for Supreme Court.

May 12, 1975—Notice of filing petition for certiorari in Supreme Court as 74-1393.

July 1, 1975—Certified copy of order of Supreme Court granting certiorari in case number 74-1393.

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF MISSOURI

EASTERN DIVISION

GEORGE J. L. WULFF, JR., M.D.,
and
MICHAEL FREIMAN, M.D.,
Plaintiffs,

vs.

THE STATE BOARD OF REGISTRATION FOR THE HEALING ARTS
and
THOMAS E. SINGLETON, CHIEF OF BUREAU OF MEDICAL SERVICES, DIVISION OF WELFARE, STATE DEPARTMENT OF PUBLIC HEALTH AND WELFARE,
Defendants.

Cause No. 730 731(A)

COMPLAINT FOR DECLARATORY JUDGMENTS AND INJUNCTIVE RELIEF
Filed November 2, 1973

COUNT ONE

I Jurisdiction

Come now plaintiffs and for their cause of action in this Count One of their Complaint state:

1. Plaintiffs invoke the jurisdiction of this Court under the First, Fourth, Fifth, Eighth, Ninth and Fourteenth

Amendments to the United States Constitution; under United States Code, Title 28, Chapter 85, Section 1343; under United States Code, Title 28, Chapter 151 (Declaratory Judgments), Sections 2201 and 2202; under United States Code, Title 28, Chapter 155, Sections 2281 and 2284; and under United States Code, Title 42, Chapter 21, Section 1983.

2. The claim herein arises within this federal judicial district and division.

3. This is an action for a declaratory judgment and permanent injunction against the enforcement of or reliance upon by defendant or by any of its officers, members, agents, employees, appointees or their successors of the statutory wording "but excluding abortion" contained in Missouri Revised Statutes, Title 28, Chapter 431, Section 431.061, subsection (1)(1971).

4. Said statute, herein involved, is set out below in full:

"431.061 *Minors, treatment of certain conditions and diseases authorized*

Any physician, surgeon, any institution or facility of the state department of health, a municipal health department, or any public or private hospital may provide examination, treatment, hospitalization, medical and surgical care for any person under the age of twenty-one years, for:

(1) Pregnancy, but excluding abortion;

(2) Venereal disease;

(3) Drug or substance abuse including those referred to in chapter 195, R.S.Mo. 1969."

II Parties

5. Plaintiff, GEORGE J. L. WULFF, JR., M.D., is a duly licensed physician residing and engaged in the practice of obstetrics and gynecology within this judicial district and division. Dr. Wulff is an Associate Professor of Obstetrics and Gynecology at Washington University Medical School and a member of the staff of Barnes Hospital, Washington University Clinics, St. Luke's Hospital, Missouri Baptist Hospital and St. Joseph's Hospital of Kirkwood. He is a member and past president of the St. Louis County Medical Society, a member of the Missouri State Medical Association, a member of the American Medical Association, a member and past president of The Central Association of Obstetricians and Gynecologists, a member and past president of The St. Louis Gynecological Society, a Fellow of The American College of Surgeons and a Fellow of the American College of Obstetricians and Gynecologists. In addition, Dr. Wulff is the author of numerous, published articles in the field of obstetrics and gynecology.

6. Plaintiff, MICHAEL FREIMAN, M.D., is a duly licensed physician residing and engaged in the practice of obstetrics and gynecology within this judicial district and division. Dr. Freiman is an Instructor of Clinical Obstetrics and Gynecology at Washington University Medical School and a member of the staff of Barnes Hospital and Jewish Hospital of St. Louis. He holds certification in and is a Fellow of the American Board of Obstetricians and Gynecologists and is a member of the American Medical Association, the Missouri State Medical Association and the St. Louis City Medical Society.

7. Plaintiffs bring this cause of action on their own behalf and on behalf of the entire class consisting of duly licensed physicians and surgeons presently performing or desiring to perform abortions upon unmarried minors within the State of Missouri. Said class of physicians and surgeons is so numerous that joinder of all members is impractical. There exist substantial questions of law and fact common

to the class and the claims of plaintiffs are typical of the claims of the class. Plaintiffs will fairly and adequately represent the interests of the class.

8. Defendant, THE STATE BOARD OF REGISTRATION FOR THE HEALING ARTS, is an administrative board created by Missouri state statutes and charged with the licensing of physicians and surgeons, including plaintiffs, and may place on probation, revoke or suspend said license for unprofessional and dishonorable conduct, including the performance of an abortion upon a minor without parental consent, as presently prohibited by the stautory wording, herein challenged.

III Causes of Action

9. The wording "but excluding abortion", herein challenged, contained in subsection (1) of said involved statute, on its face:

(a) Is unconstitutionally vague and uncertain and is in violation of the specificity requirements of the Fourteenth Amendment to the United States Constitution;

(b) Deprives plaintiffs and their respective patients of the right to privacy within the physician-patient relationship and infringes upon said right, the same being protected and guaranteed by the First, Fourth, Fifth, Ninth and Fourteenth Amendments to the United States Constitution;

(c) Deprives plaintiffs of their right to practice medicine according to the highest standards of medical practice and infringes upon said right, the same being protected and guaranteed by the First, Fourth, Fifth, Ninth and Fourteenth Amendments to the United States Constitution;

(d) Deprives plaintiffs' patients of the fundamental right of a woman to determine for herself whether to bear children and infringes upon said right, the same being protected and guaranteed by the Fourth, Fifth, Eighth, Ninth and Fourteenth Amendments to the United States Constitution;

(e) Infringes upon plaintiffs' right to render and their patients' right to receive safe and adequate medical advice and treatment pertaining to the decision of whether to carry a pregnancy to term, the same being protected and guaranteed by the First, Fourth, Fifth, Eighth, Ninth and Fourteenth Amendments to the United States Constitution;

(f) Deprives plaintiffs and their patients, each in their own classification, of the equal protection of the laws by treating similarly situated classes differently and discriminatorily with no compelling justification for said classification;

(g) By their enforcement, implementation and application and by their threatened enforcement, implementation and application places plaintiffs in the position of decision making beset with such inherent possibilities of bias and conflict of interest, and exposes plaintiffs to the threat of grave civil liability and loss of property, liberty and occupation, as to deprive plaintiffs and their patients of due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution; and

(h) Directly and purposely infringes upon the right of a pregnant woman's attending physician, during the stage prior to the end of the first trimester, to make the abortion decision and render its effectuation free from state interference, contrary to guarantees of due process protected and guaranteed by the Fourteenth Amendment to the United States Constitution.

IV Relief Prayed

WHEREOF, plaintiffs pray in this Count One of their Complaint that this Court:

10. Convene a statutory court of three (3) Judges, pursuant to United States Code, Title 28, Section 2281, to hear and to determine the rights and prayers of plaintiffs, promptly and without delay.

11. Issue a declaratory judgment holding that the wording "but excluding abortion" contained in Missouri Revised Statutes, Title 28, Chapter 431, Section 431.061, subsection (1) (1971) is in violation of the constitutional rights of plaintiffs and their patients, as protected and guaranteed by the First, Fourth, Fifth, Eighth, Ninth and Fourteenth Amendments to the United States Constitution and that the same is severable from the remaining parts of said statute.

12. Issue a permanent injunction restraining defendant, its officers, members, agents, employees, appointees or their successors from enforcing, implementing, applying or relying upon said statutory wording, herein challenged, in derogation of the rights of plaintiffs and their patients, issue such other and further orders and relief as to the Court may seem meet and proper, award to plaintiffs a reasonable attorneys' fee, and tax all costs herein to defendant.

COUNT TWO

Come now plaintiffs and for their cause of action in this Count Two of their Complaint state:

I Jurisdiction

13. Plaintiffs by reference adopt paragraphs 1 and 2 of Count One above and the same are made a part hereof.

14. This is an action for a declaratory judgment and permanent injunction against the enforcement of, reliance upon, the present application of and interpretations thereunder of the statutory wording "shall not include abortions unless such abortions are medically indicated" contained

in Missouri Revised Statutes, Title 12, Chapter 208, Section 208.152, subsection (12) (1973) by defendant or by any of his agents, employees, appointees or their successors.

15. The pertinent portions of said statute herein involved are set out below in full:

> "Section 208.152. Benefit payments for medical assistance may be made on behalf of those eligible needy persons who are unable to provide for it in whole or in part, with any payments to be made on the basis of the reasonable cost of the care or reasonable charge for the services as defined and determined by the division of welfare unless otherwise hereinafter provided, for the following:
>
> (1) . . .
>
> . . .
>
> (12) Family Planning Services as defined by Federal rules and regulations provided, however, that such Family Planning Services shall not include abortions unless such abortions are medically indicated."

II Parties

16. Plaintiffs by reference adopt paragraphs 5 and 6 of Count One above and the same are made a part hereof.

17. Plaintiffs bring this cause of action on their own behalf and on behalf of the entire class consisting of duly licensed physicians and surgeons presently performing or desiring to perform abortions upon women, minors and adults, eligible for Missouri State Medicaid assistance and payments except as restricted or prohibited by the statutory wording, herein challenged. Said class of physicians and surgeons is so numerous that joinder of all members is impractical. There exist substantial questions of law and fact common to the class and the claims of plaintiffs are

typical of the claims of the class. Plaintiffs will fairly and adequately represent the interests of the class.

18. Defendant, THOMAS E. SINGLETON, is Chief of Bureau of Medical Services, Division of Welfare, State Department of Public Health and Welfare, for the State of Missouri and in said capacity directs, supervises, authorizes and controls the applications, approvals, denials and payments of claims for payment and reimbursement of medical and surgical costs and expenses arising from or related to the procedure of abortion for women eligible for Missouri State Medicaid assistance.

III Causes of Action

19. The wording "shall not include abortions unless such abortions are medically indicated", herein challenged, contained in subsection (12) of said involved statute, on its face and as applied, enforced and implemented:

(a)-(h). Plaintiffs adopt by reference subparagraphs (a) through (h) of paragraph 9 of Count One above and the same are made a part hereof.

IV Relief Prayed

WHEREFORE, plaintiffs pray in this Count Two of their Complaint that this Court:

20. Convene a statutory court of three (3) Judges, pursuant to United States Code, Title 28, Section 2281, to hear and to determine the rights and prayers of plantiffs, promptly and without delay.

21. Issue a declaratory judgment holding that the wording "shall not include abortions unless such abortions are medically indicated" contained in Missouri Revised Statutes, Title 12, Chapter 208, Section 208.152, subsection (12) (1973) is in violation of the constitutional rights of plaintiffs and their patients, as protected and guaranteed by

the First, Fourth, Fifth, Eighth, Ninth and Fourteenth Amendments to the United States Constitution and holding that women, minors and adults, eligible for Missouri State Medicaid assistance and payments, shall be eligible for such assistance and payments for the medical and surgical procedure of abortion, without restriction or qualification.

22. Issue a permanent injunction restraining defendant, his agents, employees, appointees or their successors from enforcing, implementing, replying upon and applying said statutory wording, herein challenged, in derogation of the rights of plaintiffs and their patients, issue such other and further orders and relief as to the Court may seem meet and proper, award to plaintiffs a reasonable attorneys' fee and tax all costs herein to defendant.

COUNT THREE

Come now plantiffs and for their cause of action in this Count Three of their Complaint state:

I Jurisdiction

23. Plaintiffs by reference adopt paragraphs 1 and 2 of Count One above and the same are made a part hereof.

24. This is an action for a declaratory judgment and permanent injunction against the enforcement of or reliance upon by defendant or by any of its officers, members, agents, employees, appointees or their successors of the statutory wording "pregnancy" contained in Missouri Revised Statutes, Title 28, Chapter 431, Section 431.061, subsection (1) (1971), as the same may be interpreted or applied to exclude the giving, prescribing or providing of any form of contraception or contraceptive device.

25. Said statute, herein involved, is set out below in full:

"431.061 *Minors, treatment of certain conditions and diseases authorized*

Any physician, surgeon, any institution or facility of the state department of health, a municipal health department, or any public or private hospital may provide examination, treatment, hospitalization, medical and surgical care for any person under the age of twenty-one years, for:

(1) Pregnancy, but excluding abortion;

(2) Venereal disease;

(3) Drug or substance abuse including those referred to in chapter 195, RSMo 1969."

II Parties

26. Plaintiffs by reference adopt paragraphs 5 and 6 of Count One above and the same are made a part hereof.

27. Plaintiffs bring this cause of action on their own behalf and on behalf of the entire class consisting of duly licensed physicians and surgeons presently giving, prescribing or providing or desiring to give, prescribe or provide any form of contraception or contraceptive device for unmarried minors within the State of Missouri. Said class of physicians and surgeons is so numerous that joinder of all members is impractical. There exist substantial questions of law and fact common to the class and the claims of plaintiffs are typical of the claims of the class. Plaintiffs will fairly and adequately represent the interests of the class.

28. Defendant, THE STATE BOARD OF REGISTRATION FOR THE HEALING ARTS, is an administrative board created by Missouri state statutes and charged with the licensing of physicians and surgeons, including plaintiffs, and may place on probation, revoke or suspend said

license for unprofessional conduct, including the giving, prescribing or providing contraception or any contraceptive device to a minor without parental consent, as may be prohibited by the statutory wording, herein challenged, or otherwise.

29. The wording "pregnancy", herein challenged, contained in subsction (1) of said involved statute on its face is vague and ambiguous and, if interpreted, construed and applied to exclude the giving, prescribing and providing of contraception or any contraceptive device:

(a)-(h). Plaintiffs adopt by reference subparagraphs (a) through (h) of paragraph 9 of Count One above and the same are made a part hereof.

IV Relief Prayed

WHEREFORE, plaintiffs pray in this Count Three of their Complaint that this Court:

30. Convene a statutory court of three (3) Judges, pursuant to United States Code, Title 28, Section 2281, to hear and to determine the rights and prayers of plaintiffs, promptly and without delay.

31. Issue a declaratory judgment holding that the wording "pregnancy" contained in Missouri Revised Statutes, Title 28, Chapter 431, Section 431.061, subsection (1) (1971), if interpreted, construed or applied to exclude the giving, prescribing or providing of any form of contraception or contraceptive device, is in violation of the constitutional rights of plaintiffs and their patients, as protected and guaranteed by the First, Fourth, Fifth, Eighth, Ninth and Fourteenth Amendments to the United States Constitution.

32. Issue a permanent injunction restraining defendant, its officers, members, agents, employees, appointees or their successors from enforcing, implementing, applying or rely-

ing upon said statutory wording herein challenged, in derogation of the rights of plaintiffs and their patients, issue such other and further orders and relief as to the Court may seem meet and proper, award to plaintiffs a reasonable attorneys' fee and tax all costs herein to defendant.

FRANK SUSMAN
SUSMAN WILLER & RIMMEL
705 Olive Street—Suite 1212
St. Louis, Missouri 63101
(314) 621-2030

Attorneys for Plaintiffs

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF MISSOURI

EASTERN DIVISION

(Title Omitted in Printing)

ENTRY OF APPEARANCE

November 26, 1973

Come now John C. Danforth, Attorney General, State of Missouri, and Kermit W. Almstedt, Assistant Attorney General, State of Missouri, and make their entry of appearance as attorneys for defendant Thomas E. Singleton, Chief of Bureau of Medical Service, Division of Welfare, in the above-entitled cause of action.

Respectfully submitted,

JOHN C. DANFORTH
Attorney General

KERMIT W. ALMSTEDT
Assistant Attorney General

Supreme Court Building
Jefferson City, Missouri 65101
(314) 751-3321

Attorneys for Defendant

(Certificate of Service Omitted in Printing)

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF MISSOURI

EASTERN DIVISION

(Title Omitted in Printing)

PLAINTIFF'S INTERROGATORIES DIRECTED TO DEFENDANT, THOMAS E. SINGLETON, CHIEF OF BUREAU OF MEDICAL SERVICES, DIVISION OF WELFARE, STATE DEPARTMENT OF PUBLIC HEALTH AND WELFARE

December 14, 1973

Come now plaintiff and, pursuant to Rule 33 of The Federal Rules of Civil Procedure, propound the following interrogatories to defendant, THOMAS E. SINGLETON, CHIEF OF BUREAU OF MEDICAL SERVICES, DIVISION OF WELFARE, STATE DEPARTMENT OF PUBLIC HEALTH AND WELFARE:

1. State the number, dates, amounts paid and information justifying that the same were "medically indicated" for all abortions for which said defendant or others under his supervision made or authorized payments for medical assistance under Mo.R.S., Section 208.152 since January 1, 1972.

2. State in detail the present interpretation applied by defendant or others under his supervision to the term "abortions medically indicated"; what medical criteria is included and excluded under said definition; and, what medical symptoms, diagnosis, indications or justifications

would qualify an abortion to be "medically indicated" under Mo.R.S., 208.152, as codified and as applied by defendant or others under his supervision.

3. State each and every medical or surgical procedure for which payments are authorized and made under Mo.R.S. 208.152 and the amounts authorized or made for each of the same.

4. State for each and every medical or surgical procedure listed in response to interrogatory no. 3, the total sums paid for each type of procedure since January 22, 1973 to date.

FRANK SUSMAN
SUSMAN WILLER & RIMMEL
705 Olive Street—Suite 1212
St. Louis, Missouri 63101
(314) 621-2030

Attorneys for Plaintiffs

(Certificate of Service Omitted in Printing)

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF MISSOURI

EASTERN DIVISION

(Title Omitted in Printing)

MOTION TO DISMISS

December 17, 1973

Comes now defendant, Thomas E. Singleton, Chief of Bureau of Medical Services, Division of Welfare, State Department of Public Health and Welfare, by his attorney of record, John C. Danforth, Attorney General, State of Missouri, and specifically by Kermit W. Almstedt, Assistant Attorney General, State of Missouri, pursuant to Rule 12, Federal Rules of Civil Procedure, and moves this Court to dismiss Count II of plaintiff-doctors' complaint as against him for the following reasons:

(1) That the declaratory relief prayed for does not present to this Court a case or controversy ripe for judicial determination.

(2) That the plaintiff-doctors do not possess the requisite standing to litigate the constitutional issues raised.

(3) That the injunctive relief requested cannot be granted since the plaintiff-doctors are not susceptible to irreparable harm through any possible manner of enforcement of the statutory section under litigation; and furthermore, the administrative remedies established under the state welfare laws have not been exhausted.

(4) That the complaint fails to state a cause of action since the plaintiff-doctors personally could suffer no harm cognizable under Title 42 U.S.C. §1983 with jurisdiction under Title 28 U.S.C. §1343; and furthermore, plaintiff-doctors cannot litigate the alleged deprivation or infringement of the civil rights of their welfare patients.

WHEREFORE, defendant Singleton, prays that Count II of plaintiff-doctors complaint be dismissed as against him without the necessity of convening a three judge-district court, at plaintiff-doctors' cost and for such other and further relief as this Court deems proper in the premises.

Respectfully submitted,

JOHN C. DANFORTH
Attorney General

KERMIT W. ALMSTEDT
Assistant Attorney General

Supreme Court Building
Jefferson City, Missouri 65101
(314) 751-3321

Attorneys for Defendant

(Certificate of Service Omitted in Printing)

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF MISSOURI

EASTERN DIVISION

(Title Omitted in Printing)

DEFENDANT THOMAS E. SINGLETON'S ANSWERS TO PLAINTIFFS' PROPOUNDED INTERROGATORIES

Interrogatory No. One

State the number, dates, amounts paid and information justifying that the same were "medically indicated" for all abortions for which said defendant or others under his supervision made or authorized payments for medical assistance under Mo.R.S., Section 208.152 since January 1, 1972.

Answer to Interrogatory No. One

1. The Revised Statutes of Missouri, under Section 208.152, have not permitted authorization for medical assistance payments within the state of Missouri for abortion operations prior to the effective date, September 28, 1973, when such statutory section was amended by Senate Bill No. 302. Senate Bill No. 302 authorized medical assistance payments for medically indicated abortions. For the months of September (after the 28th), October, November and December, 1973 no such payments were made.

Interrogatory No. Two

State in detail the present interpretation applied by defendant or others under his supervision to the term "abor-

tions medically indicated"; what medical criteria is included and excluded under said definition; and, what medical symptoms, diagnosis, indications or justifications would qualify an abortion to be "medically indicated" under Mo.R.S., 208.152, as codified and as applied by defendant or others under his supervision.

Answer to Interrogatory No. Two

2. No definition or interpretation has been established for the phrase "abortions medically indicated" and no determination has been made as to what medical symptoms, diagnoses, indications or justifications would qualify an abortion to be "medically indicated".

Interrogatory No. Three

State each and every medical or surgical procedure for which payments are authorized and made under Mo.R.S. 208.152 and the amounts authorized or made for each of the same.

Answer to Interrogatory No. Three

3. The answer to Interrogatory No. 3 may be derived or ascertained from the business records, or examination thereof, of the Division of Welfare, specifically, the Procedure Code Listing which lists approximately 12,000 medical or surgical procedures for which payments are authorized under Section 208.152 of the Revised Statutes of Missouri and which listing has the fee schedule allowed for each such medical or surgical procedure. The plaintiffs are afforded a reasonable opportunity to examine such records and to make copies or summaries thereof. Such listing is under the control of defendant Thomas E. Singleton. Defendant Singleton states that the burden of deriving or ascertaining the answer to Interrogatory No. 3 from the Procedure Code Listing is substantially the same for the party serving the interrogatory as for the party served.

Interrogatory No. Four

State for each and every medical or surgical procedure listed in response to interrogatory no. 3, the total sums paid for each type of procedure since January 22, 1973 to date.

Answer to Interrogatory No. Four

4. Defendant's attorney has objected to Interrogatory No. 4.

STATE OF MISSOURI }
COUNTY OF COLE } ss

I, Thomas E. Singleton, Chief of Bureau of Medical Services, Division of Welfare, upon my oath state the above facts and information are true to the best of my knowledge and belief.

THOMAS E. SINGLETON
Chief of Bureau of Medical Services
Division of Welfare

(Jurat Omitted in Printing)

JOHN C. DANFORTH
Attorney General

KERMIT W. ALMSTEDT
Assistant Attorney General

Supreme Court Building
Jefferson City, Missouri 65101
(314) 751-3321

Attorneys for Defendants

(Certificate of Service Omitted in Printing)

Exhibit A

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MISSOURI

EASTERN DIVISION

(Title Omitted in Printing)

AFFIDAVIT OF PLAINTIFF GEORGE J. L. WULFF, JR., M.D.

February 19, 1974

Comes now plaintiff, GEORGE J. L. WULFF, JR., M.D., and states that he submits this Affidavit in opposition to the Motion to Dismiss heretofore filed by each respective defendant in this cause. Said Affidavit is attached as "Exhibit A" and made a part of the Memoranda of plaintiffs filed in opposition to said Motions to Dismiss. Said plaintiff further states:

1. He is a citizen of the United States and a resident of St. Louis County, Missouri.

2. He is a duly licensed physician within the State of Missouri being the holder of license no. 21306 issued him on July 10, 1933. He is actively engaged in the practice of obstetrics and gynecology within the State of Missouri with his principal office and place of business located at 5505 Delmar, St. Louis, Missouri.

3. He is a diploma recipient from Washington University School of Medicine, and an Associate Professor of Obstetrics and Gynecology at said University. He is a member and past president of the St. Louis County Medical Society, the St. Louis Gynecological Society, and the Cen-

tral Association of Obstetrics and Gynecology. He is also a member of the Missouri State Medical Association, American Medical Association, Fellow of American College of Surgeons and Fellow of American College of Obstetricians and Gynecologists. He is the past Chief of the Obstetrics and Gynecology Department of St. Luke's Hospital, St. Louis, Missouri. He is also a medical staff member of Barnes Hospital, Washington University Clinics, Missouri Baptist Hospital and St. Joseph Hospital, all of said hospitals being within the St. Louis, Missouri area.

4. At his principal office, at the hospitals of which he is a medical staff member, and at other locations, all within the State of Missouri, he provides and renders and anticipates providing and rendering medical services, *including abortion and contraceptive advice,* to numerous patients, many of whom are minors and/or welfare recipients and said medical services are controlled and regulated by the statutes herein challenged.

5. He fears the defendant State Board of Registration for the Healing Arts will discipline him, and he is threatened by the powers of said Board to seek reprisals against him, based upon his past performance of abortions and anticipated future performance of abortions upon unmarried minors, without parental consent, on a non-emergency basis. The present and real threat of discipline, probation, censure and license revocation or suspension by said Board for his performance of abortions upon minors as aforestated deters him from the practice of medicine in the manner he considers to be most expertise and beneficial for his minor patients and in the manner he considers to be in the highest standard of medical practice and said threat chills and thwarts the ordinary and customary functioning of the doctor-patient relationship between this plaintiff and his minor patients.

6. He fears the defendant State Board of Registration for the Healing Arts will discipline him, and he is threatened by the powers of said Board to seek reprisals against him, based upon his treatment of and anticipated treatment of unmarried minors, without parental consent, on a non-emergency basis. The present and real threat of discipline, probation, censure and license revocation or suspension by said Board for his treatment of minors as aforestated deters him from the practice of medicine in the manner he considers to be most expertise and beneficial for his minor patients and in the manner he considers to be in the highest standard of medical practice and said threat chills and thwarts the ordinary and customary functioning of the doctor-patient relationship between this plaintiff and his minor patients.

7. He fears the defendant State Board of Registration for the Healing Arts will discipline him, and he is threatened by the powers of said Board to seek reprisals against him, based upon his past and anticipated dispensing or prescribing of any form of contraception or contraceptive devices to unmarried minors, without parental consent, on a non-emergency basis. The present and real threat of discipline, probation, censure and license revocation or suspension by said Board for his dispensing or prescribing contraceptives to minors as aforestated deters him from the practice of medicine in the manner he considers to be most expertise and beneficial for his minor patients and in the manner he considers to be in the highest standard of medical practice and said threat chills and thwarts the ordinary and customary functioning of the doctor-patient relationship between this plaintiff and his minor patients.

8. He is uncertain of the present interpretation applied by defendant Thomas E. Singleton, Chief of Bureau of Medical Services, Division of Welfare, State Department of Pub-

lic Health and Welfare, or others under said derendant's supervision to the term "abortions medically indicated"; what criteria are included and excluded under said definition; and, what medical symptoms, diagnosis, indications or justifications would qualify an abortion to be "medically indicated" under §208.152 R.S.Mo. 1969, as codified and as applied by said defendant and/or others under his supervision. By virtue of said plaintiff's uncertainty in respect to §208.152 R.S.Mo. 1969, he is deterred from the practice of medicine in the manner he considers to be most expertise and beneficial for his welfare patients eligible for Medicaid payments and in the manner he considers to be in the highest standard of medical practice and said uncertainty chills and thwarts the ordinary and customary functioning of the doctor-patient relationship between this plaintiff and his welfare patients eligible for Medicaid payments.

9. He has provided, and anticipates providing abortions to welfare patients who are eligible for Medicaid payments but he and said patients have been refused, and anticipate future refusals by defendant Singleton and/or those under his supervision to make Medicaid payments for abortions based upon the challenged language in §208.152 R.S.Mo. 1969. Said refusals by said defendant, and anticipated future refusals of a like nature deter this plaintiff from the practice of medicine in the manner he considers to be most expertise and beneficial for said patients and in the manner he considers to be in the highest standard of medical practice and said refusals chill and thwart the ordinary and customary functioning of the doctor-patient relationship between this plaintiff and said patients.

GEORGE J. L. WULFF, JR., M.D.

(Jurat Omitted in Printing)

Exhibit B

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MISSOURI

EASTERN DIVISION

(Title Omitted in Printing)

AFFIDAVIT OF PLAINTIFF MICHAEL FREIMAN, M.D.

February 19, 1974

Comes now plaintiff, MICHAEL FREIMAN, M.D., and states that he submits this Affidavit in opposition to the Motion to Dismiss heretofore filed by each respective defendant in this cause. Said Affidavit is attached as "Exhibit B" and made a part of the Memoranda of plaintiffs filed in opposition to said Motions to Dismiss. Said plaintiff further states:

1. He is a citizen of the United States and a resident of St. Louis County, Missouri.

2. He is a duly licensed physician within the State of Missouri being the holder of license No. 26130 issued him on July 16, 1955. He is actively engaged in the practice of obstetrics and gynecology within the State of Missouri with his principal office and place of business located at 8631 Delmar, St. Louis, Missouri.

3. He is a diploma recipient from Washington University School of Medicine, and an Instructor of Obstetrics and Gynecology at said University. He is a member of the St. Louis City Medical Society, the Missouri State Medical

Association, American Medical Association and Fellow of American College of Obstetricians and Gynecologists. He is a medical staff member of Barnes Hospital and Jewish Hospital, both of said hospitals being within the St. Louis, Missouri area.

4. At his principal office, at the hospitals of which he is a medical staff member, and at other locations, all within the State of Missouri, he provides and renders and anticipates providing and rendering medical services, *including abortion* and *contraceptive advice,* to numerous patients, many of whom are minors and/or welfare recipients and said medical services are controlled and regulated by the statutes herein challenged.

5. He fears the defendant State Board of Registration for the Healing Arts will discipline him, and he is threatened by the powers of said Board to seek reprisals against him, based upon his past performance of abortions and anticipated future performance of abortions upon unmarried minors, without parental consent, on a non-emergency basis. The present and real threat of discipline, probation, censure and license revocation or suspension by said Board for his performance of abortions upon minors as aforestated deters him from the practice of medicine in the manner he considers to be most expertise and beneficial for his minor patients and in the manner he considers to be in the highest standard of medical practice and said threat chills and thwarts the ordinary and customary functioning of the doctor-patient relationship between this plaintiff and his minor patients.

6. He fears the defendant State Board of Registration for the Healing Arts will discipline him, and he is threatened by the powers of said Board to seek reprisals against him, based upon his treatment of and anticipated treatment of unmarried minors, without parental consent, on a non-

emergency basis. The present and real threat of discipline, probation, censure and license revocation or suspension by said Board for his treatment of minors as aforestated deters him from the practice of medicine in the manner he considers to be most expertise and beneficial for his minor patients and in the manner he considers to be in the highest standard of medical practice and said threat chills and thwarts the ordinary and customary functioning of the doctor-patient relationship between this plaintiff and his minor patients.

7. He fears the defendant State Board of Registration for the Healing Arts will discipline him, and he is threatened by the powers of said Board to seek reprisals against him, based upon his past and anticipated dispensing or prescribing of any form of contraception or contraceptive devices to unmarried minors, without parental consent, on a non-emergency basis. The present and real threat of discipline, probation, censure and license revocation or suspension by said Board for his dispensing or prescribing contraceptives to minors as aforestated deters him from the practice of medicine in the manner he considers to be most expertise and beneficial for his minor patients and in the manner he considers to be in the highest standard of medical practice and said threat chills and thwarts the ordinary and customary functioning of the doctor-patient relationship between this plaintiff and his minor patients.

8. He is uncertain of the present interpretation applied by defendant Thomas E. Singleton, Chief of Bureau of Medical Services, Division of Welfare, State Department of Public Health and Welfare, or others under said defendant's supervision to the term "abortions medically indicated"; what criteria are included and excluded under said definition; and, what medical symptoms, diagnosis, indications or justifications would qualify an abortion to be "medically

indicated'' under §208.152 R.S.Mo. 1969, as codified and as applied by said defendant and/or others under his supervision. By virtue of said plaintiff's uncertainty in respect to §208.152 R.S.Mo. 1969, he is deterred from the practice of medicine in the manner he considers to be most expertise and beneficial for his welfare patients eligible for Medicaid payments and in the manner he considers to be in the highest standard of medical practice and said uncertainty chills and thwarts the ordinary and customary functioning of the doctor-patient relationship between this plaintiff and his welfare patients eligible for Medicaid payments.

9. He has provided, and anticipates providing abortions to welfare patients who are eligible for Medicaid payments but those who have submitted applications for such payments on his behalf and said patients have been refused, and anticipate future refusals by defendant Singleton and/or those under his supervision to make Medicaid payments for abortions based upon the challenged language in §208.152. R.S.Mo. 1969. Said refusals by said defendant, and anticipated future refusals of a like nature deter this plaintiff from the practice of medicine in the manner he considers to be most expertise and beneficial for said patients and in the manner he considers to be in the highest standard of medical practice and said refusals chill and thwart the ordinary and customary functioning of the doctor-patient relationship between this plaintiff and said patients.

MICHAEL FREIMAN, M.D.

(Jurat Omitted in Printing)

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF MISSOURI

EASTERN DIVISION

(Title Omitted in Printing)

MOTION FOR EXTENSION OF TIME AND SUGGESTIONS IN SUPPORT THEREOF

February 22, 1974

Comes now defendant, Thomas E. Singleton, Chief of Bureau of Medical Services, Division of Welfare, by and through his attorney of record, Kermit W. Almstedt, Assistant Attorney General, State of Missouri, and moves this court to enter an appropriate order extending the time in which defendant Thomas E. Singleton has to file appropriate materials in opposition to the affidavits filed with plaintiffs' Memorandum in Opposition to the Motion to Dismiss by Defendant Singleton in the above captioned case for an additional thirty days from February 25, 1974 through March 27, 1974.

The reasons for such extension of time are the following:

(1) That pursuant to Rule 12(b) (6) of the Federal Rules of Civil Procedure, when any ''matters outside the pleading are presented to and not excluded by the court, the motion (referring to a motion to dismiss for failure to state a claim upon which relief can be granted) shall be treated as one for summary judgment and disposed of as

provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56."

(2) That plaintiffs have filed affidavits in connection with their Memorandum in Opposition to defendant Singleton's motion to dismiss and unless this court excludes such affidavits from its consideration, by Rule 12(b) (6), Federal Rules of Civil Procedure, defendant should be granted a reasonable opportunity to present material in opposition to the material presented in the affidavits of plaintiffs. Such an extension may be granted pursuant to this court's Rule VIII(c) (4).

(3) That Assistant Attorney General, Kermit W. Almstedt, contacted by telephone his client on the date of receipt of plaintiffs' Memorandum in Opposition to defendant Singleton's motion to dismiss and was informed that it would take approximately thirty days to compile the necessary data and information in order to contravene any allegations of fact raised in plaintiffs' affidavits.

(4) That the request for extension of thirty days is not made for any dilatory reason and should be an appropriate amount of time for defendant Singleton, through his attorney of record, Kermit W. Almstedt, Assistant Attorney General, State of Missouri, to file all necessary material in opposition to plaintiffs' affidavits filed in support of plaintiffs' Memorandum in Opposition to defendant Singleton's Motion to Dismiss.

WHEREFORE, defendant Singleton, by and through his attorney of record, moves this court to grant additional time to March 27, 1974, in which defendant Singleton has to file his materials in opposition to the affidavits filed

with plaintiffs' Memorandum in Opposition to defendant Singleton's motion to dismiss.

Respectfully submitted,

JOHN C. DANFORTH
Attorney General

KERMIT W. ALMSTEDT
Assistant Attorney General

Supreme Court Building
Jefferson City, Missouri 65101
(314) 751-3321

Attorneys for Defendant

(Certificate of Service Omitted in Printing)

IN THE

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MISSOURI

EASTERN DIVISION

WULFF, JR., M. D., et al.,
Plaintiffs,

vs.

STATE BOARD OF REGISTRATION FOR THE HEALING ARTS, et al.,
Defendants.

No. 73C 731(A)

MEMORANDUM

May 31, 1974

This matter is before the Court on motion of defendant, State Board of Registration for the Healing Arts (hereinafter referred to as State Board), to dismiss Counts I and II of the plaintiffs' complaint, and on motion of defendant, Thomas E. Singleton, to dismiss Count II of plaintiffs' complaint. Counts I and III name the State Board as defendant and Count II names Thomas E. Singleton as defendant.

Plaintiffs, George J. L. Wulff, Jr. and Michael Freiman, are physicians licensed by the State of Missouri, engaging in the practice of obstetrics and gynecology. Defendant, State Board, is an administrative board created by Missouri state statutes charged with the licensing of physicians. The State Board has the power to revoke or suspend a physician's license for unprofessional and dishonorable conduct under R. S. Mo. 334.100. Defendant, Thomas E. Singleton, is the Chief of the Bureau of Medical Services, Division of Welfare, State Department of Public

the highest standards of medical practice, deprives plaintiffs' patients of the fundamental right of a woman to determine for herself whether to bear children, infringes upon plaintiffs' right to render and their patients' right to receive safe and adequate medical advice and treatment, deprives plaintiffs and their patients of the equal protection of the law and due process of law, and constitutes state interference with the abortion decision, all of which is in violation of the United States Constitution.

The contentions relied upon by the defendant State Board to sustain its motion to dismiss Counts I and III may be summarized as follows:

(1) Plaintiffs failed to state a claim upon which relief can be granted.

(2) The State Board is not a proper party defendant.

(3) Plaintiffs failed to allege the existence of a "controversy".

(4) Plaintiffs failed to allege enforcement by the State Board of the challenged statute and therefore the court should abstain from interpreting the state statute.

(5) There is relief available to plaintiffs in state courts and agencies.

The grounds relied upon by defendant Singleton to sustain his motion to dismiss Count II may likewise be summarized as follows:

(1) The declaratory relief prayed for does not constitute a "case or controversy ripe" for determination by this Court.

(2) Plaintiffs lack standing to litigate the constitutional questions presented.

(3) Injunctive relief cannot be granted in that the plaintiffs are not susceptible to irreparable harm by virtue of enforcement of the challenged statute.

(4) Plaintiffs have not exhausted administrative remedies.

(5) Plaintiffs could not personally suffer harm for which relief can be granted under 42 USC 1983.

COUNT I

R. S. Mo. 431.061 (See Footnote 1), which plaintiffs seek to attack in Counts I and III, was enacted in 1971 by the Missouri General Assembly as Section 1 of House Bill 73 and must be read and construed in connection with R. S. Mo. 431.062[2] and 431.063,[3] which were Sections 2 and 3 of

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[2] 431.062. *Minor cannot disaffirm contract, when—parents or guardian not liable, exception—disclosure by physician authorized, when*

Whenever a minor is examined, treated, hospitalized, or receives medical or surgical care under section 461.061:

(1) His consent shall not be subject to disaffirmance or revocation because of minority;

(2) The parent, parents, or legal guardian shall not be liable for payment for such care unless the parent, parents, or legal guardian has expressly agreed to pay for such case;

(3) A physician or surgeon may with or without the consent of the minor patient, advise the parent, parents, or legal guardian of the examination, treatment, hospitalization, medical and surgical care given or needed if the physician or surgeon has reason to know the whereabouts

House Bill 73. *Mitchem* v. *Perry*, 390 S. W. 2d 600.603 (Mo. App. 1965). When so read and construed it is apparent that R. S. Mo. 431.061 only relates to minors' ability to contractually bind themselves to pay for medical treatment for pregnancy, venereal disease and drug abuse. It is true that under R. S. Mo. 431.061(1) the treatment for pregnancy for which an unmarried minor may contractually bind herself excludes abortions. The effect of this exclusion is simply to leave the law unchanged as it relates to contracts for abortion. That is to say that a minor may not be held contractually liable for the cost of receiving an abortion unless she ratifies the debt contracted after she reaches majority. R. S. Mo. 431.060. This does not constitute a prohibition against giving abortions to minors.

Neither the statute under attack, R. S. Mo. 431.061, nor the two statutes enacted as part of the same bill (R. S. Mo.

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of the parent, parents, or legal guardian. Such notification or disclosure shall not constitute libel or slander, a violation of the right of privacy or a violation of the rule of privileged communication. In the event that the minor is found not to be pregnant or not afflicted with a venereal disease or not suffering from drug or substance abuse, the no information with respect to any appointment, examination, test or other medical procedure shall be given to the parent, parents, legal guardian or any other person.

[3] 431.063. *Minor's consent legally binding, when*

Any person, under the age of twenty-one years, who is examined, treated, hospitalized or who receives medical or surgical treatment under sections 431.061 to 431.063 may give legal consent, and no person who administers such medical or surgical treatment shall be liable, except for negligence, for treating such minor without advising the parent, parents, or legal guardian.

431.062 and 431.063) provide any sanctions for the performance of an abortion on an unmarried minor without parental consent. In fact, Missouri does not in light of *Roe* v. *Wade*, 410 U. S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973), *Doe* v. *Bolton*, 410 U. S. 179, 93 S. Ct. 739, 35 L. Ed. 2d 201 (1973), and *Rodgers* v. *Danforth*, Civ. No. 18360-2 (W.D. Mo.), affirmed November 19, 1973, 42 Law Week 3301, No. 73-426 (copy of opinion attached), at this time have sanctions for abortions performed on adults or minors as long as the abortionist is a licensed physician.

Plaintiffs contend in their affidavits filed in opposition to the defendants' motions to dismss that they fear reprisals from the defendant State Board, in that the State Board may discipline them under R. S. Mo. 334.100 based upon their past performances of abortions and anticipated future performances of abortions upon unmarried minors, without parental consent, on a non-emergency basis. R. S. Mo. 334.100 provides, in part, that a licensee may be placed on probation or the license suspended or revoked when a physician is found guilty of unprofessional or dishonorable conduct. That statute then continues, stating:

> "Without limiting the foregoing general language, the following specifications shall be deemed unprofessional and dishonorable conduct within the meaning of this section:
>
> • • • • • • •
>
> "(3) Committing an unlawful abortion;"

As pointed out above, since the decisions in *Wade*, *Bolton* and *Rodgers*, supra, and the failure of the Missouri Legislature to enact a statute within permissible limits of those cases, Missouri no longer has any prohibition against abortion, when it is performed by a physician. Therefore, any abortion performed by a licensed physician is not an unlawful abortion. What plaintiffs seek in reality is a declaratory judgment by this Court that the performance of an abortion by a licensed physician on an unmarried minor without parental consent on a non-emergency basis is not unprofessional and dishonorable conduct under R. S. Mo. 334.100.

In order for this Court to rule on the constitutionality of the statutory wording "but excluding abortion" in R. S. Mo. 431.061 under the Declaratory Judgment Act, 28 USC 2201, as prayed for in plaintiffs' complaint, there must exist an "actual controversy" between the parties and without such actual controversy this Court is without power to grant declaratory relief. *Maryland Casualty Co.* v. *Pacific Coal & Oil Co.*, 312 U. S. 270, 61 S. Ct. 510, 85 L. Ed. 826 (1941). In *Golden* v. *Zwickler*, 394 U. S. 103, 108, 89 S. Ct. 956, 22 L. Ed. 2d 113 (1969), the Supreme Court said:

> "'[T]he federal courts established pursuant to Article III of the Constitution do not render advisory opinions. For adjudication of constitutional issues, "concrete legal issues, presented in actual cases, not abstractions," are requisite. This is as true of declaratory judgments as any other field.' *United Public Workers of America* v. *Mitchell*, 330 U.S. 75, 89 (1947). 'The difference between an abstract question and a "controversy" contemplated by the Declaratory Judgment Act is necessarily one of degree, and it would be difficult, if it would be possible, to fashion a precise test for determining in every case whether there is such a controversy. Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.' *Maryland Casualty Co.* v. *Pacific Coal & Oil Co.*, 312 U. S. 270, 273 (1941)."

From the foregoing, it is clear that the ingredients necessary to sustain a complaint for declaratory judgment are: (a) a substantial controversy; (b) between parties having adverse legal interests; and (c) the controversy must possess "immediacy and reality." The plaintiffs here do not claim that they have ever been threatened with disciplinary action by the State Board or that disciplinary action by the State Board is even likely. The most that can be said of the plaintiffs is that they feel uneasy or inhibited in performing abortions on minors without parental consent. The mere possibility or even probability that the plaintiffs may sometime in the future be adversely affected by a disciplinary action of the State Board not yet threatened does not create an "actual controversy" which is a prerequisite created by the clear language of the Declaratory Judgment Act. *Garcia* v. *Brownell,* 236 F. 2d 356 (9th Cir. 1956), cert. denied 362 U. S. 963, 80 S. Ct. 880, 4 L. Ed. 2d 878 (1960).

COUNT II

In Count II plaintiffs challenge the constitutionality of the statutory wording, "shall not include abortions unless such abortions are medically indicated", contained in R. S. Mo. 208.152(12). The pertinent portions of R. S. Mo. 208.152 are as follows:

> "Benefit payments for medical assistance may be made on behalf of those eligible needy persons who are unable to provide for it in whole or in part, with any payments to be made on the basis of the reasonable cost of the care or reasonable charge for the services as defined and determined by the division of welfare unless otherwise hereinafter provided, for the following:
>
> • • • • •
>
> "(12) Family Planning Services are defined by Federal rules and regulations provided, however, that such Family Planning Services shall not include abortions unless such abortions are medically indicated."

As established by the above statute, the medical reimbursements for medical assistance in the area of "medically indicated" abortions are made on behalf of those eligible needy persons who are unable to provide for it in whole or in part. Since the medical payments are made "on behalf" of the needy individual, there can be no argument but that the welfare recipient is the intended beneficiary of this statutory section. It is the welfare recipient and not their physician who by Federal Title 45, Public Welfare Chapter II, Social Rehabilitation Services (Federal Register, Vol. 38, No. 157, Wed., August 15, 1973) under part 205.10(a) (5) is granted a right to a hearing if that person's claim for medical reimbursement assistance is denied and it is the welfare recipient who is afforded the right to appeal such decision through the administrative process required by federal regulation and established under R. S. Mo. 208.156. This raises the question as to whether the plaintiffs have standing to litigate the constitutionality of the statute here in question.

Plaintiffs state in their affidavits filed in opposition to defendant Singleton's motion to dismiss that they have provided and anticipate providing abortions to welfare patients who are eligible for Medicaid payments for medical assistance, and that those patients who have submitted applications for such payments have been refused and that they anticipate future refusals by defendant Singleton based upon the challenged language in R. S. Mo. 208.152. Plaintiffs further state that such refusals by defendant Singleton deter plaintiffs from the practice of medicine in the manner they consider to be most expertise and beneficial to their patients.

Plaintiffs cite *Doe* v. *Scott*, 321 F. Supp. 1385 (N.D. Ill. 1970), *Roe* v. *Wade*, supra, and *Doe* v. *Bolton*, supra, as authority for their contention that they have standing to litigate the constitutionality of R. S. Mo., 208.152. *Doe* v. *Scott*, supra, was an action for declaratory and injunctive relief brought to declare an Illinois criminal abortion statute unconstitutional. The plaintiff-physicians in *Scott* alleged that the existence of the Illinois criminal abortion statute interfered with and adversely affected their ability to conduct their medical practices with proper regard for their patients' best interest. The district court in *Scott*, l.c. 1388, held:

> "[T]he physician-plaintiffs have standing to raise the claims of their patients even if we assume that no independent claim of theirs could withstand a motion for judgment of the pleadings."

The court in *Scott* cited *Griswold* v. *Connecticut*, 381 U. S. 479, 481, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965) and *Barrows* v. *Jackson*, 346 U. S. 249, 257, 73 S. Ct. 1031, 97 L. Ed. 1586 (1953) as supporting authority for its decision that the plaintiff-physicians had standing to raise the claims of their patients with respect to the constitutionality of the Illinois abortion statute.

In *Griswold* v. *Connecticut*, supra, the appellant-physician had been convicted as an accessory for giving information and medical advice on how to prevent conception in violation of a Connecticut statute making it a crime for any person to use any drug or article to prevent conception. In relation to the appellant-physician's standing the Supreme Court said, l.c. 481:

> "We think that appellants have standing to raise the constitutional rights of the married people with whom they had a professional relationship. *Tileston* v. *Ullman*, 318 U. S. 44, is different, for there the plaintiff seeking to represent others asked for a declaratory judgment. In that situation we thought that the requirements of standing should be strict, lest the standards of 'case or controversy' in Article III of the Constitution become blurred. Here those doubts are removed by reason of a criminal conviction for serving married couples in violation of an aiding-and-abetting statute. Certainly the accessory should have standing to assert that the offense which he is charged with assisting is not, or cannot constitutionally be, a crime."

In *Barrows* v. *Jackson*, supra, a white defendant who was a party to a racially restrictive covenant was being sued for damages by the covenantors because she had conveyed her property to Negroes. The defendant was allowed to raise the issue that enforcement of the covenant violated the rights of prospective Negro purchasers to equal protection of the law, although no Negro was a party to the suit. The Supreme Court said, l.c. 255-256:

> "Ordinarily, one may not claim standing in this Court to vindicate the constitutional rights of some third party. Reference to this rule is made in varied situations. See *Joint Anti-Fascist Refugee Comm.* v. *McGrath*, 341 U. S. 123, 149-154 (concurring opinion). The requirement of standing is often used to describe the constitutional limitation of the jurisdiction of this Court to 'cases' and 'controversies'. See *Coleman* v. *Miller*, 307 U. S. 433, 464 (concurring opinion). Apart from the jurisdictional requirement, this Court has developed a complementary rule of self-restraint for its own goverance (not always clearly distinguished from the constitutional limitation) which ordinarily precludes a person from challenging the constitutionality of state action by invoking the rights of others. See *Ashwander* v. *Tennessee Valley Authority*, 297

U. S. 288, 346-348 (concurring opinion). The common thread underlying both requirements is that a person cannot challenge the constitutionality of a statute unless he shows that he himself is injured by its operation. This principle has no application to the instant case in which respondent has been sued for damages totaling $11,600, and in which a judgment against respondent would constitute a direct, pocketbook injury to her."

The Supreme Court went on to say in relation to its rule on standing, l.c. 257:

"This is a salutary rule, the validity of which we reaffirm. But in the instant case, we are faced with a unique situation in which it is the action of the state *court* which might result in a denial of constitutional rights and in which it would be difficult if not impossible for the persons whose rights are asserted to present their grievance before any court. Under the peculiar circumstances of this case, we believe the reasons which underlie our rule denying standing to raise another's rights, which is only a rule of practice, are outweighed by the need to protect the fundamental rights which would be denied by permitting the damages action to be maintained. Cf. *Quong Ham Wah Co.* v. *Industrial Acc. Comm'n,* 184 Cal. 26, 192 P. 1021."

Roe v. *Wade,* supra, and *Doe* v. *Bolton,* supra, the other two cases relied upon by plaintiffs in the instant case to support their contention that they have standing, are somewhat similar in that they both attack the constitutionality of state criminal abortion statutes. In *Roe* v. *Wade,* supra, the Supreme Court held the plaintiff-physician in *Wade* was under indictment for violating the Texas criminal abortion statute and the Supreme Court dismissed his complaint and remitted him to his defenses

in the state criminal proceedings against him where he could raise the constitutionality of the statute under which he was charged. In *Doe* v. *Bolton,* supra, the plaintiff-physicians alleged that the Georgia criminal abortion statute chilled and deterred them from practicing their profession. The Supreme Court in holding that the plaintiff-physicians had standing said, l.c. 188:

"[T]he physician-appellants, who are Georgia licensed doctors consulted by pregnant women, also present a justiciable controversy and do have standing despite the fact that the record does not disclose that any one of them has been prosecuted or threatened with prosecution for violation of the State's abortion statutes. The physician is the one against whom these criminal statutes directly operate in the event he procures an abortion that does not meet the statutory exceptions and conditions. The physician-appellants, therefore, assert a sufficiently direct threat of personal detriment. They should not be required to await and undergo a criminal prosecution as the sole means of seeking relief."

In the instant case the plaintiff-physicians have not been convicted as accessories to a criminal offense as the plaintiff-physician was in *Griswold* v. *Connecticut,* supra. The plaintiff-physicians here do not present a unique situation such as was presented to the court in *Barrows* v. *Jackson,* supra, and they are not being sued for damages as in *Barrows,* where a judgment against them would constitute a direct pocketbook injury. Also in *Barrows,* the Supreme Court felt it would be difficult if not impossible for the Negroes whose rights were being asserted by the defendant therein to present their grievance before any court. This is not the situation here for in the instant case the persons whose rights the plaintiffs are really asserting

(their patients who are eligible to receive Medicaid payments) have a statutory right to a hearing before a state agency as stated above where they can present their grievance and if not satisfied they can carry their grievance on to the appropriate court. Neither are the plaintiff-physicians herein subject to the direct operation of any criminal anti-abortion statute as the plaintiff-physicians were in *Roe* v. *Wade,* supra, and *Doe* v. *Bolton,* supra, and, therefore, cannot assert a sufficiently direct threat of personal detriment as the plaintiff-physicians in those cases could. The only possible detriment the plaintiffs in the instant case can suffer under their contentions in Count II is the possibility that their patients who are eligible for medical assistance under R. S. Mo. 208.152 will not be able to pay for the services the plaintiffs have rendered to them in giving them an abortion operation.

Keeping in mind that it is the welfare recipient in whose behalf medical assistance payments under R. S. Mo. 208.152 are made and that it is the welfare recipient and not their physicians who have a right to a hearing if their medical assistance claims are denied, and that the plaintiff-physicians are not prohibited from performing abortions, this Court finds that the standing requirement of *Flast* v. *Cohen,* 392 U. S. 83, 102, 88 S. Ct. 1942, 20 L. Ed. 2d 947 (1968) that there be a logical nexus between the status asserted by the plaintiffs and the claim they seek to have adjudicated is not satisfied by the litigative posture of the plaintiff-physicians herein, and, therefore, they lack standing to challenge the constitutionality of the statute in question here. This is not to say that the issue the plaintiffs bring to this Court is not justiciable, but is only to say that these plaintiffs are not the proper parties to request an adjudiciation. *Flast* v. *Cohen,* supra.

Count III

Plaintiffs contend that the word "pregnancy" in R. S. Mo. 431.061 is vague and ambiguous and *if* it is interpreted, construed and applied to exclude the giving, prescribing and providing of contraceptive devices to minors without parental consent then it would be subject to all of the constitutional defects alleged in Count I.

It is apparent from the plaintiffs' pleadings in Count III that the plaintiffs do not present an actual controversy in Count III as required under the Declaratory Judgment Act. Therefore, this Court's reasoning in relation to Count I and the law applied there equally applies here in Count III.

In view of this Court's findings it is not necessary to discuss the defendants' remaining contentions.

Accordingly, for the reasons above stated, the motion of the defendant, State Board, to dismiss Counts I and III for lack of controversy, and the motion of defendant Singleton to dismiss Count II for lack of standing, are sustained.

The Clerk of the Court will prepare and enter the proper order dismissing the case.

WILLIAM H. WEBSTER
Circuit Judge

JAMES H. MEREDITH
U. S. District Judge

ROY W. HARPER
U. S. District Judge

APPENDIX TO MEMORANDUM

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF MISSOURI

WESTERN DIVISION

SAMUEL U. RODGERS, M.D., et al.,
Plaintiffs,

vs.

JOHN C. DANFORTH, Attorney General of the State of Missouri, et al.,
Defendants.

Civil Action No. 18360-2

MEMORANDUM OPINION AND JUDGMENT

This complaint attacked the constitutionality of Missouri criminal abortion statutes. The basic statute, Section 559.100, Missouri Revised Statutes, 1959, as amended, declares the production of all miscarriages and abortions a felony "unless the same is necessary to preserve her (the mother's) life or that of an unborn child," with different penalties for the death of a "quick" and "unquick" foetus. The complaint sought both declaratory and injunctive relief.

Because of the prayer for injunctive relief, a three-judge federal court was convened under the provisions of Title 28, U.S.C. Section 2281.

A motion to intervene was filed by "Baby Doe" and an M.D. on behalf of all unborn children "who will or may be adversely affected by the action before this court."

The defendant named in the original complaint was the Attorney General of Missouri, in his official capacity, and later, by an amended complaint, the Prosecuting Attorney of Jackson County, Missouri, was added as a party defendant, who was made the class representative of all prosecuting attorneys in Missouri, by subsequent court order.

The Court then granted the motion of the defendants to dismiss this action on the sole grounds of abstention, and ordered the cause dismissed without prejudice. The plaintiffs appealed this judgment to the Supreme Court.

While the appeal was pending, that Court decided the cases of *Roe* v. *Wade,* 410 U.S. (1973), and *Doe* v. *Bolton,* 410 U.S. (1973), and remanded this case to this Court "for further consideration in light of" these two cases.

After the remand, the defendants filed an answer denying the existence of a justiciable controversy and alleging that the attacked statutes are justified by compelling state interests, to-wit: the protection of human life and the protection of potential human life. The answer requested a jury trial under either Rule 38 or 39, Federal Rules of Civil Procedure.

The plaintiffs filed a motion for summary judgment based on affidavits of two of the plaintiffs who are medical doctors, and a third person who is Executive Director of Suicide Prevention, Inc., a United Fund agency in St. Louis.

The defendant Attorney General has filed lengthy suggestions in opposition to the motion for summary judgment, accompanied by the affidavit of an M.D. which controverts affidavits filed by plaintiffs as to the "chilling effect" of Missouri abortion statutes on the practice of their profession by doctors in Missouri.

The argument of the Attorney General of Missouri is

that in *Roe* v. *Wade, supra*, the Supreme Court did not determine "whether an unborn child is human life"; that this is a question of fact which can only be determined by triers of the fact after hearing evidence from expert witnesses; that if human life exists from the moment of conception the State has a compelling interest to protect this life; and that summary judgment cannot be granted when such an issue of fact exists.

This Court finds that the teachings of *Roe* v. *Wade, supra*, completely contradict this argument. The opinion stated that the "existence of life from the moment of conception" is the official belief of the Catholic Church, of many non-Catholics, and "a view strongly held . . . by many physicians."

But, the opinion states, "We need not resolve the difficult question of when life begins." No statement could be clearer. Whether life begins at conception, at quickening, at viability, or at birth (the alternatives discussed in the opinion), the Court held that resolution of this question would not affect the decision.

The defendants' prayer for trial of the factual issue of "when life begins" is denied.

The lack of justiciable controversy issue raised by the answer is fully discussed and ruled upon in the case of *Doe* v. *Bolton, supra*. That case holds:

> "We conclude, however, that the physician-appellants, who are Georgia-licensed doctors consulted by pregnant women, also present a justiciable controversy and do have standing despite the fact that the record does not disclose that any of them has been prosecuted, or threatened with prosecution, for violation of the State's abortion statutes."

Four of the plaintiffs in this case are eminent, Missouri-

licensed obstetricians and gynecologists, and their standing as plaintiffs, under the teachings of *Doe* v. *Bolton* cannot be questioned.

In *Roe* v. *Wade* the Court quoted from the Texas statute it found unconstitutional and stated, "Similar statutes are in existence in a majority of the States.[2]" Footnote 2 lists "Mo. Rev. § 559.100 (1969);"

There can be no question that this Missouri statute referred to in that opinion is unconstitutional under the teachings of the two Supreme Court cases which we were mandated to consider. The other two statutes attacked are based upon the validity of § 559.100 and must similarly be held unconstitutional. The plaintiffs' motion for summary judgment will be granted.

In both *Roe* v. *Wade* and *Doe* v. *Walton* the Supreme Court affirmed the lower court's granting of a declaratory judgment and denial of injunctive relief, stating in both cases that the Court would assume that the state prosecutorial authorities would give full recognition and credence to the Court's judgment as to the unconstitutionality of the State statute.

In this case the defendant Attorney General has not given "full recognition" or "credence" to the ruling of the Supreme Court. It does not appear that a declaratory judgment in this case, in view of the Attorney General's publicly stated position, will suffice to guarantee the constitutional rights of pregnant women and their consulting doctors as decided by the Supreme Court, and, it is therefore

ORDERED that the defendant Attorney General of the State of Missouri, and the defendant class of all Prosecuting Attorneys in the State of Missouri be, and they hereby are, enjoined from instituting any criminal prosecutions,

complaints for warrants, or complaints for search warrants under, or by authority of, unconstitutional Sections 542.380(3), 559.100, or 563.300, Revised Statutes of Missouri, 1969. Costs taxed to defendant Attorney General in his official capacity.

FLOYD R. GIBSON
Circuit Judge

ELMO B. HUNTER
District Judge

WILLIAM R. COLLI SON
District Judge

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF MISSOURI

EASTERN DIVISION

(Title Omitted in Printing)

PLAINTIFFS' MOTION FOR LEAVE OF COURT TO ADD PARTIES PLAINTIFF(S)

June 17, 1974

Come now plaintiffs, pursuant to Rule 21 of the Federal Rules of Civil Procedure, and move this Court for an Order granting plaintiffs leave of County until July 15, 1974 in which time to add parties plaintiff(s) in Count II herein and as grounds and reasons therefor state:

1. On or about May 31, 1974 this Court entered its "Order and Judgment" dismissing Count II herein for lack of standing.

2. In the Court's "Memorandum", filed on or about May 31, 1974 in support of said "Order and Judgment", the Court stated that the issues raised by Count II are justiciable but that these plaintiffs are not the proper parties to request an adjudication thereof.

3. Should leave be granted by this Court as herein requested plaintiffs will, on or before July 15, 1974, add parties plaintiff(s), who are welfare recipients aggrieved by the statutory language of §208.152 R.S.Mo. (1973 Supp.), herein challenged, and who therefor possess the requisite standing to adjudicate the justiciable issues presented to this Court in said Count II.

4. The relief sought herein will not prejudice defendants but rather will expedite the claim asserted in said County II, by preventing an additional suit relitigating the issues therein presented.

5. The relief sought herein is just and proper.

WHEREFORE, plaintiffs pray for Order of this Court granting leave to plaintiffs until July 15, 1974 in which time to add parties plaintiff(s) in Count II herein.

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FRANK SUSMAN
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St. Louis, Missouri 63105

Attorneys for Plaintiffs

(Certificate of Service Omitted in Printing)

IN THE

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MISSOURI

EASTERN DIVISION

GEORGE J. L. WULFF, JR., M.D., et al.,
Plaintiffs,
vs.
STATE BOARD OF REGISTRATION FOR THE HEALING ARTS, et al.,
Defendants.
} No. 73C 731 (A)

MEMORANDUM AND ORDER

June 24, 1974

This matter is before the Court on plaintiffs' motion pursuant to Rule 21 FRCP to grant plaintiffs leave until July 15, 1974, to add parties plaintiff(s) in Count II of this cause. This motion was filed on June 17, 1974, seventeen days after this Court filed a Memorandum and Order dismissing Count II of plaintiffs' complaint for lack of standing of the plaintiffs therein.

It is hereby ordered that the motion of the plaintiffs pursuant to Rule 21 FRCP for leave until July 15, 1974, to add parties plaintiff(s) in Count II of this cause is denied.

The cases cited by the plaintiffs in support of their position, *Reichenberg* v. *Nelson*, 310 F. Supp. 248 (D. Nebr. 1970) and *Mullaney* v. *Anderson*, 342 U. S. 415, 72 S. Ct. 428, 96 L. Ed. 458 (1952), are not applicable. In the instant cause plaintiffs do not seek to have specific parties

added or substituted as plaintiffs, as was done in the above cited cases. Here plaintiffs ask the court for time to seek out plaintiffs whose litigative posture would satisfy the requirements of standing. This request is completely outside of the bounds of Rule 21 FRCP and is, therefore, denied.

ROY W. HARPER
U.S. District Judge

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF MISSOURI

EASTERN DIVISION

(Title Omitted in Printing)

NOTICE OF APPEAL

Notice is hereby given that plaintiffs, GEORGE J. L. WULFF, JR., M.D., and MICHAEL FREIMAN, M.D., hereby appeal to the United States Court of Appeals for the Eighth Circuit from an "Order And Judgment" dismissing Count II of said cause for lack of standing entered in the above entitled cause on the 31st day of May, 1974.

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Attorneys for Plaintiffs

JUDGMENT

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

SEPTEMBER TERM, 1974

George J. Wulff, Jr., M.D., and Michael Freiman, M.D.,
Appellants,
vs.
The State Board of Registration for the Healing Arts
and
Thomas E. Singleton, Chief of Bureau of Medical Services, Division of Welfare, State Department of Public Health and Welfare,
Appellee.

No. 74-1484

Appeal from the United States District Court for the Eastern District of Missouri.

December 31, 1974

This cause came on to be heard on the original files for the United States District Court for the Eastern District of Missouri and briefs of the respective parties and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by thist [sic] Court that the judgment of the said District Court in this cause be and the same is hereby reversed.

And it is further ordered by this Court that this cause be and is hereby remanded to the said District Court for proceedings consistent with the opinion of this Court this day filed herein.

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 74-1484

George J. L. Wulff, Jr., M.D. and Michael Freiman, M.D.,
Appellants.
vs.
Thomas E. Singleton, Chief of Bureau of Medical Services, Division of Welfare, State Department of Public Health and Welfare,
Appellee.

Appeal from the United States District Court for the Eastern District of Missouri

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SUBMITTED: DECEMBER 13, 1974
FILED: DECEMBER 31, 1974

Before MATTHES, Senior Circuit Judge, ROSS and STEPHENSON, Circuit Judges.

STEPHENSON, Circuit Judge.

This appeal from the order of a statutory three-judge district court dismissing plaintiff's cause of action for lack of standing raises troublesome questions of jurisdiction and procedure as well as a question concerning state interference with the abortion decision. The three-judge court opinion is reported as *Wulff* v. *State Board of Registration*

for *Healing Arts*, 380 F.Supp. 1137 (E.D. Mo. 1974). We reverse.

Appellants, Missouri licensed medical doctors, brought a three count complaint for declaratory and injunctive relief against the Missouri State Board of Registration for the Healing Arts and against Thomas E. Singleton in his capacity as Chief of the Bureau of Medical Services. The complaint challenged the constitutionality of state statutes regarding welfare benefits, claiming that the statutory wording

> is vague and uncertain, deprives plaintiffs and their patients of the right to privacy, deprives plaintiffs of their right to practice medicine according to the highest standards of medical practice, deprives plaintiffs' patients of the fundamental right of a woman to determine for herself whether to bear children, infringes upon plaintiffs' right to render and their patients' right to receive safe and adequate medical advice and treatment, deprives plaintiffs and their patients of the equal protection of the law and due process of law, and constitutes state interference with the abortion decision, all of which is in violation of the United States Constitution.

380 F. Supp. 1137, 1139.

The three-judge court dismissed Count II of the complaint for lack of standing by the medical doctors to challenge the constitutionality of the statute. *See Wulff, supra* at 1144. Appeal was filed in this court.[1]

I. APPELLATE JURISDICTION

The portal question we have goes to the propriety of

[1]The appeal concerns only Count II of the complaint. Appellants do not challenge the district court's ruling on Counts I and III.

an appeal to this court from an order entered by a district court of three judges.[2]

That inquiry has been settled for us in the instant case by the United States Supreme Court's recent decision in *Gonzalez* v. *Automatic Employees Credit Union*, No. 73-858 (filed December 10, 1974), 43 Law Week 4025.

In *Gonzalez* appellant took his appeal directly to the Supreme Court from a three-judge court order dismissing the complaint for lack of standing. The court observed that when the basis of decision by a three-judge court is lack of standing, the case is such that "a single judge could have declined to convene a three-judge court" or "the three-judge court could have dissolved itself, leaving final disposition of the complaint to a single judge." *Gonzalez* at 4028 (footnote omitted). The Court went on to say:

> We hold, therefore, that when a three-judge court denies a plaintiff injunctive relief on grounds which, if sound, would have justified dissolution of the court as to that plaintiff, or a refusal to request the convention of a three-judge court *ab initio*, review of the denial is available only in the Court of Appeals.

43 Law Week 4025, 4028-29. This court has jurisdiction in the instant case.

[2]28 U.S.C. § 1253 provides:

> Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.

II. STANDING

The district court found that there was no logical nexus between the status of appellant-physicians and the claims they sought to have adjudicated. *Flast* v. *Cohen*, 392 U.S. 83 (1968). We disagree.

This court made clear in *Nyberg* v. *City of Virginia*, 495 F.2d 1342 (1974), *cert. denied*, 95 S.Ct. 169:

> We think that the Supreme Court in Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973) and Doe v. Bolton, 410 U.S. 179, 93 S.Ct. 739, 35 L.Ed.2d 201 (1973) has clearly paved the way for physicians to assert their constitutional rights to practice medicine, which now includes the right to advise and perform abortions. • • •
>
> • • •
>
> Clearly the claims of medical doctors to "freely practice medicine according to the highest medical standards without arbitrary outside restraints" are inextricably bound up with the privacy rights of women who seek abortions. YWCA v. Kugler, 342 F. Supp. 1048, 1055 (D.N.J. 1972). This is sufficient to present a justiciable controversy and confer standing on the physicians who bring this action. *See* Griswold v. Connecticut, 381 U.S. 479, 481, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965); Abele v. Markle, 452 F.2d 1121, 1125 (CA2 1971); stay granted, 409 U.S. 908, 93 S.Ct. 212, 34 L.Ed. 2d 169 (1972), remanded for consideration in light of Roe and Doe, 410 U.S. 951, 93 S.Ct. 1417, 35 L.Ed.2d 683 (1973); Doe v. Turner, 361 F.Supp. 1288, 1289 (D. Iowa 1973) (3 judge court); Freeman & Bass, P. A. v. State of N.J. Com'n of Invest., 359 F.Supp. 1053, 1059 (D.N.J. 1973); *cf.* O'Shea v. Littleton, 414 U.S. 488, 94 S.Ct. 699, 38 L.Ed.2d 674 (1974). Furthermore, the practical effect of the stringent limitation on the use of

> hospital facilities for performing abortions is to arbitrarily bar the physicians from activities that directly affect their economic interests. Abele v. Markle, *supra*, 452 F.2d at 1125; *see also*, Data Processing Service v. Camp, 397 U.S. 150, 90 S.Ct. 827, 25 L.Ed.2d 184 (1970); Epperson v. Arkansas, 393 U.S. 97, 89 S.Ct. 266, 21 L.Ed.2d 228 (1968).

We reiterated the same thought more succinctly in *Word* v. *Poelker*, 495 F.2d 1349, 1350 (8th Cir. 1974), where we said:

> It is now clear from the decisions in Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973) and Doe v. Bolton, 410 U.S. 179, 93 S.Ct. 739, 35 L.Ed.2d 201 (1973) that a sweeping regulation of the abortion decision and its implementation raises clear questions of constitutional dimension regarding a medical doctor's right to practice. Doe v. Bolton, *supra* at 188, 93 S.Ct. 739; Roe v. Wade, *supra* at 165 of 410 U.S., 93 S.Ct. 705. • • •.

See Orr v. *Koefoot*, 377 F.Supp. 673, 678 (D. Neb. 1974); *Poe* v. *Menghini*, 339 F.Supp. 986, 990 & note 8 (D. Kan. 1972); *Doe* v. *Scott*, 321 F.Supp. 1385, 87-88 (N.D. Ill. 1970); *see also Wounded Knee Legal Defense/Offense Committe* v. *F.B.I.*, No. 73-1908 (8th Cir., filed November 7, 1974), slip opinion at 6.

The statute in question interferes with the doctor-patient relationship as it relates to the abortion decision. It injects unnecessarily restrictive rules upon a constitutionally protected decision of doctor and patient as surely as did the statutes in the above cited cases. The statute interferes with the appellants' practice of medicine both professionally and monetarily.

We think that there is no question that (1) appellants allege that the challenged acts have caused them "injury

in fact, economic or otherwise" and (2) "the interests sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U.S. 150, 152-53 (1970). To hold otherwise in light of the authority cited above would defy logic. These medical doctors have standing to pursue this action.

III. THIS COURT'S JURISDICTION TO REACH THE MERITS

We are urged by appellants to reach the merits of this case rather than remand to the three-judge court. This question is not without its difficulty. There is little direct authority for the propriety of our reaching the merits. Nevertheless, we are satisfied that under the circumstances of this case and in the interest of judicial economy and logic we should now address the merits of this controversy.

Of course, the three-judge court has not determined the merits. This court is not generally a court of original jurisdiction. Even so, there is authority for the proposition that when a case is properly before a Court of Appeals, the court has the power "to do what plainly ought to be done." *Mercury Motor Express, Inc.* v. *Brinke*, 475 F.2d 1086, 1091 (5th Cir. 1973), *citing* 9 Moore's Federal Practice § 110.25 [1] (2d ed. 1972).

In reaching the merits of a case which was before the court pursuant to an interlocutory appeal under 28 U.S.C. § 1292(b) this court said:

> We adhere to the proposition that it would be improper to consider "grave constitutional questions" where there exists "reasonable likelihood" that further proceedings could help clarify the issues. *Borden's Farm Products Co.* v. *Baldwin*, 293 U.S. 194, at 213, 55 S.Ct. 187, 79 L.Ed. 281. However, in the present proceeding no further pleadings or evidence is necessary for "refinement or clarification of the issues." *United States* v. *Petrillo*, 332 U.S. 1, 67 S.Ct. 1538, 91 L.Ed. 1877; *United States* v. *Fabre, Inc.*, M.D. Ga., 206 F.Supp. 523. And we should dispose of all controversies "as expeditiously as is consistent with proper judicial administration." *Turner* v. *City of Memphis*, 369 U.S. 350, 82 S.Ct. 805, 7 L.Ed.2d 762.

Board of Managers of Ark. Tr. Sch. for Boys v. *George*, 377 F.2d 228, 231 (8th Cir. 1967). In addition, Mr. Justice Clark in writing for the Supreme Court has indicated that effective judicial administration requires disposal of the case on appeal rather than remanding, where the point to be decided is clear. *Levin* v. *Mississippi River Fuel Corporation*, 386 U.S. 162, 170 (1967), 87 S.Ct. 927, 932.

It might be argued that the above authority, though persuasive, should not apply in the instance of an appeal to the Court of Appeals from a statutory three-judge court.

The Supreme Court has made it clear that the three-judge court mandate must be construed quite narrowly. "Congress established the three-judge court apparatus for one reason: to save state and federal statutes from improvident doom, on constitutional grounds, at the hands of a single federal district judge." *Gonzalez, supra* 43 Law Week 4027.

For this court to get to the heart of the matter and dispose of this case on the merits will not conflict with the policy behind the statute. Indeed, we think this case is particularly proper for disposition in this court since "[w]hile § 2281 calls for three judges to enjoin a statute 'upon the ground' of its 'unconstitutionality,' we [the Supreme Court] have held that three judges are not in fact necessary where the unconstitutionality of the statute is obvious

and patent * * *." *Gonzalez, supra* at 4027, footnote 14, *citing Bailey* v. *Patterson*, 369 U.S. 31 (1962).

The statute in question is obviously unconstitutional, and it is our view that the case might well have been decided by one federal judge. *See generally Roe* v. *Norton*, 380 F.Supp. 726, 728 (D. Conn. 1974). Accordingly, we choose to make final determination of this case.

IV. MERITS

The statute before the court states:

> Benefit payments for medical assistance may be made on behalf of those eligible needy persons who are unable to provide for it in whole or in part, with any payments to be made on the basis of the reasonable cost of the care or reasonable charge for the services as defined and determined by the division of welfare unless otherwise hereinafter provided, for the following:
>
> * * *
>
> Family planning services are defined by federal rules and regulations provided, however, that such family planning services shall not include abortions unless such abortions are medically indicated.

As in *Word* v. *Poelker, supra* 495 F.2d 1349, 1350, the issue in this case concerns the facial constitutionality of the statute viewed against the glare of the Supreme Court's decisions in *Roe* v. *Wade, Doe* v. *Bolton*, and the precedent which has developed as a result of those cases.

We find it unnecessary to review again *Roe* and *Doe* or what this court has said in applying those cases. Suffice it to say that the statute here provides medical payments if the pregnancy is carried to term or for therapeutic abortions but not if a non-therapeutic abortion is performed. This classification is a clear violation of the Equal Protection Clause of the Fourteenth Amendment.

There is ample case authority for the holding that a welfare payments statute which places special regulation on abortion but not upon other medical procedures cannot stand in light of the Supreme Court decisions. *Doe* v. *Rose*, 499 F.2d 1112 (10th Cir. 1974); *Doe* v. *Westby*, ——F.Supp. ——, No. 74-5017 (W.D. S.D., filed September 24, 1974); *Roe* v. *Norton*, 380 F.Supp. 726 (D. Conn. 1974); *Doe* v. *Wohlgemuth*, 376 F. Supp. 173 (W.D. Pa. 1974); *Doe* v. *Rompton*, 366 F.Supp. 189 (D. Utah 1973); *Klein* v. *Nassau Co. Medical Center*, 347 F.Supp. 496 (E.D. N.Y. 1972); *see also Doe* v. *Hale Hospital*, 500 F.2d 144 (1st Cir. 1974).

The control meted out by this statute does not give proper consideration to the conflicting constitutional interests involved. *Word, supra* at 1351. It is further invalid since the welfare parent and her physician are discriminated against by reason of the patient's poverty. *Compare, e.g., Klein, supra.*

We declare R.S.Mo. 208.152(12) to be unconstitutional on its face. Injunctive relief should be unnecessary. We assume that the state will abide by the ruling of this court and that medical assistance payments will be made on a nondisparate basis to those eligible needy persons who elect to carry their pregnancy to term or who receive therapeutic abortions and also to those who elect nontherapeutic abortions.

Reversed.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

(Title Omitted in Printing)

PETITIONER'S MOTION FOR REHEARING

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SUSMAN, SCHERMER, WILLER & RIMMEL
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St. Louis, Missouri 63105
(314) 725-7300

Attorneys for Petitioners-Appellants

PETITIONERS' MOTION FOR REHEARING

Come now petitioners (appellants herein) and pursuant to Rule 40 of the Federal Rules of Appellate Procedure respectfully move this Honorable Court to consider the following two (2) points with respect to the judgment and opinion, heretofore rendered on December 31, 1974.

Point I

Petitioners suggest that the conclusionary statement of this Honorable Court in said judgment and opinion that "(W)e declare R.S.Mo. 208.152(12) to be unconstitutional on its face" (Slip Opinion, page 9), may be broadly interpreted by some to imply the rejection of R.S.Mo. 208.152(12) in its entirety for reason of its unconstitutionality.

R.S.Mo. 208.152(12) provides, *in toto*,

> "(12) Family Planning Service as defined by Federal rules and regulations provided, however, that such Family Planning Services shall not include abortions unless such abortions are medically indicated."

Such an interpretation would exceed appellants' claim for relief as contained in their "Complaint For Declaratory Judgments and Injunctive Relief", paragraph 21, requesting the trial court,

> "21. Issue a declaratory judgment holding that the wording 'shall not include abortions unless such abortions are medically indicated' contained in Missouri Revised Statutes, Title 12, Chapter 208, Section 208.152, subsection (12) (1973) is in violation of the constitutional rights of plaintiffs and their patients, . . ."

Such a holding would be more extensive than that sought by appellants' and would be greatly detrimental to appellants and to their patients; since to invalidate subsection 12 in its entirety would eradicate funding for all forms of family planning, presently provided by Missouri state medicaid program. The offensive wording, "shall not include abortions unless such abortions are medically indicated" is properly severable.

As stated in 16 *Am.Jur.*2d, "Constitutional Law", Section 186, pp. 414-415,

> "If, however, the constitutional and the unconstitutional portions are so dependent on each other as to warrant the belief that the legislature intended them to take effect in their entirety, it follows that if the whole cannot be carried into effect, it will be presumed that the legislature would not have passed the residue independently, and accordingly, the entire statute is invalid." . . .

"[I]f the purpose of a statute is to accomplish a single object only and some of its provisions are unconstitutional and void, the whole must fail, unless sufficient remains to effect the object without the aid of the invalid portions."

As cited with approval in *State ex rel. State Board of Medication* v. *Pigg*, 244 S.W.2d 75 (Mo. 1951) at pp. 84-85,

"The rule is stated in State ex rel. Transport Mfg. & Equipment Co. v. Bates, 359 Mo. 1002, 224 S.W.2d 996, 1001, as follows: 'It is generally true if the invalid provision of a statute and the residue thereof are wholly independent of each other, readily separable, and completely distinct; and if the residue is of itself complete, sensible and capable of being executed that the invalid provision will fall and the residue of the statute will stand. * * * The fact that the residue of an act remaining after a portion has been declared invalid may be complete in and of itself is not always sufficient to sustain it. If the invalid portion is so connected with the residue of the statute as to furnish the consideration for the enactment of the residue and as to warrant the belief that they were intended as a whole and that the Legislature would not have passed the part remaining had it known the other part would be held invalid, then the entire act must fall.' And see 50 Am.Jur. 354, Statutes, Sec. 353; 11 Am.Jur. 834, Const.Law, Secs. 152 and 155."

The cited authority leaves no doubt as to the severability of the constitutionally offensive wording from the remainder of said subsection 12.

Accordingly, petitioners respectfully move this Honorable Court to amend its judgment and opinion to conform unequivocably with petitioners' relief as prayed, contained in their "Complaint", and to hold the challenged wording

of said subsection 12 ("shall not include abortions unless such abortions are medically indicated") to be both unconstitutional and severable from the remaining portions of said subsection.

POINT II

Petitioners' request that pursuant to paragraph 22 of appellants' "Complaint", specifically requesting the trial court to "award to plaintiffs a reasonable attorneys' fee", that this Honorable Court award same based upon the "Affidavit" of petitioners' counsel, *infra.*

The award of such fees has been recognized by other courts both under the theory of a "common fund" (*Mills,* et al. v. *The Electric Auto-Lite Company,* et al., 396 U.S. 375 [1970]) and the theory of the "private attorney general" (*LaRaza Unida,* etc., et al. v. *Volpe,* et al., 57 F.R.D. 94 [N.D.Cal. 1972], *affirmed on other grounds,* 488 F.2d 559 [9th Cir. 1973] and *Miller,* et al. v. *Amusement Enterprises, Inc.,* 426 F.2d 534 [5th Cir. 1970]). Both such theories are applicable here.

Other leading cases awarding fees in similar cases include *Brandenburger,* et al. v. *Thompson,* 494 F.2d 885 (9th Cir. 1974) involving constitutional challenge to state welfare requirement, *Hoitt,* et al. v. *Vitek,* et al., 495 F.2d 219 (1st Cir. 1974) involving deprivation of prisoners' constitutional rights, *Jordan,* et al. v. *Fusari,* 496 F.2d 646 (2nd Cir. 1974) involving constitutionality of state's unemployment compensation plan and *Class* v. *Norton,* —F.2d— (No. 74-1702, 2nd Cir. Oct. 10, 1974) involving constitutional challenge to policy of state welfare commissioner. For a detailed list of twelve distinct factors to be considered in determining the amount of attorneys' fees to be awarded, see *Johnson,* et al v. *Georgia Highway Express, Inc.,* 488 F.2d 714, 717-719 (5th Cir. 1974). See, also, *Scott* v. *Home Mutual Telephone Co.,* 510 S.W.2d 793 (Mo.Ct.App. 1974).

The award of attorneys' fees in this case will further serve notice upon the State of Missouri and its political subdivisions that they may not cavalierly continue to pass legislation unconstitutionally restricting the rights of physicians and their patients in the area of abortion, without bearing some part of the burden of those who must challenge the same to be free from the oppressive and chilling yoke it imposes. For a partial history in Missouri, see *Rodgers,* et al. v. *Danforth,* et al., —U.S.—, 38 L.Ed2d 327 (Nov. 19, 1973), *Word,* et al. v. *Poelker,* et al., 495 F.2d 1349 (8th Cir. 1974), *Doe,* et al. v. *Poelker,* et al., 497 F.2d 1063 (8th Cir. 1974) cause no. 73C565(A) still pending E.D.Mo., *Wulff,* et al. v. *Singleton,* —F.2d—(8th Cir., Dec. 31, 1974) and *Planned Parenthood of Central Missouri,* et al. v. *Danforth,* et al., cause no. 74-416C(A) pending E.D.Mo.

The tragedy of this legislative pattern is the existence of its provisions during the time necessary to obtain favorable appellate decisions. Each and every case to date has been summarily and adversely disposed of by the district court and preliminary injunctive relief denied. Each and every case has been reversed upon appeal.

Accordingly, petitioners respectfully move this Honorable Court to award reasonable attorney's fees in this cause.

Respectfully submitted,

FRANK SUSMAN
SUSMAN, SCHERMER, WILLER & RIMMEL
7733 Forsyth Boulevard, Suite 1100
St. Louis, Missouri 63105
(314) E25-7300

Attorneys for Petitioners-Appellants

AFFIDAVIT

Comes now Affiant, Frank Susman, and states:

1. He is a duly licensed attorney admitted to practice before the bars of the State of Missouri, the United States Eighth Circuit Court of Appeals and the United States Supreme Court, among others.

2. He is a partner in the firm of Susman, Schermer, Willer and Rimmel and he and said firm are counsel for appellants in *Wulff, et al.* v. *Singleton,* —F.2d— (No. 74-1484, 8th Cir. Dec. 31, 1974).

3. He devotes a significant portion of his law practice to the field of appellate, constitutional matters and since January 1, 1973 has been chief counsel in three (3) such matters reaching the United States Supreme Court, two (2) such matters reaching the Missouri Supreme Court and two (2) such matters reaching the United States Eighth Circuit Court of Appeals.

4. He has been extensively involved in abortion rights litigation both locally, *Rodgers, supra, Word, supra, Doe, supra, Wulff, supra, Planned Parenthood of Central Missouri, supra* and nationally, *Roe,* et al v. *Wade,* 410 U.S. 113 (1973), *Doe,* et al. v. *Bolton,* et al., 410 U.S. 179 (1973), etc.

5. The handling of such cases has resulted in critical comment and disapproval by other clients of Affiant and said firm and has had a disparaging business and social effect upon Affiant.

6. Affiant's customary charge for appellate work of this nature is sixty dollars ($60.00) per hour and said firm's customary charge for its associates assisting in work of this nature is forty dollars ($40.00 per hour.

7. Affiant has expended fifty-three and one-quarter

(53.25) hours in the representation of this cause and the associates of said firm have expended fifty-seven (57) hours in the representation of this cause.

8. Based upon Affiant's experience and personal knowledge of abortion circumstances in the State of Missouri, it is his best conservative opinion that seven thousand five hundred women, eligible for state medicaid have undergone abortions since January 22, 1973 and have not to date received any state medicaid payments for same due to the legislation challenged herein.

9. The nature, importance and time elements of this matter required that it receive significant priority over and above the majority of the remainder of Affiant's legal practice.

10. A fair and reasonable attorneys' fee in this cause to date is five thousand four hundred seventy-five dollars ($5,475.00).

(*Jurat Omitted in Printing*)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 74-1484

George J. L. Wulff, Jr., M.D., and Michael Freiman, M.D.,
Appellants,

vs.

Thomas E. Singleton, Chief of Bureau of Medical Services, Division of Welfare, State Department of Public Health and Welfare,
Appellee.

Order on Appellants' Motion for Rehearing

Filed: January 9, 1975

Before MATTHES, Senior Circuit Judge, ROSS and STEPHENSON, Circuit Judges.

PER CURIAM

Appellants seek clarification of our holding and further request that we award to appellants a reasonable attorney fee.

It was the Court's intention and we now reiterate our holding that that portion of R.S.Mo. 208.152(12) which states "that such Family Planning Services shall not include abortions unless such abortions are medically indicated" is unconstitutional.

The application for attorney fee is denied.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

(Title Omitted in Printing)

MOTION FOR STAY OF MANDATE

January 20, 1975

TO THE HONORABLE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT:

Defendant-Appellee respectfully presents this, his application for, and moves the court to enter, an order staying the issuance of mandate in this case, under the provisions of Section 2101(f), Title 28, United States Code, and pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, because it is the bonafide intention of said appellee to make proper and timely application to the Supreme Court of the United States for writ of certiorari.

The grounds upon which said petition for certiorari will be based are substantially as follows:

1. The decision of the Court of Appeals for the Eighth Circuit, reversing the decision of the United States District Court for the Western District of Missouri, as to the right of appellants-doctors to maintain suit alleging the unconstitutionality of the Missouri state statute restricting Medicaid payments to eligible welfare recipients in particular instances, is in conflict with the decisions of the United States Supreme Court on the matter of standing in ***Flast*** v. ***Cohen,*** 392 U.S. 83, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968);

Association of Data Processing Service Organizations, Inc. v. *Camp,* 397 U.S. 150, 90 S.Ct. 827, 25 L.Ed.2d 184 (1970); and *Barlow* v. *Collins,* 397 U.S. 159, 90 S.Ct. 832, 25 L.Ed.2d 192 (1970). The preceeding decisions by the United States Supreme Court have been misconstrued, misapplied, and misconceived in the decision rendered by the Court of Appeals for the Eighth Circuit in the present case.

2. The said decision of said Court of Appeals finding Section 208.152(12) of the Revised Statutes of the State of Missouri unconstitutional on its face denied the defendant-appellee the right to present evidence and legal argument pertaining to the constitutionality of said section because this case appeared before said Court of Appeals in the posture of an appeal from a dismissal of appellants'-doctors' complaint in the United States District Court for the Western District of Missouri on the basis that said parties were without standing to bring suit. Said Court of Appeals, by examining and ruling on the merits of the present case where the court below was given no opportunity so to do nor was the defendant-appellee ever given an opportunity to respond to the merits of the controversy has so departed from the accepted and usual course of judicial proceedings as to call for an exercise of the United States Supreme Court's power of supervision.

3. The said decision of said Court of Appeals as to the right of appellants-doctors to maintain the present suit creates very important issues which ought to be considered and decided upon by the United States Supreme Court because said decision would allow a doctor to bring suit alleging the unconstitutionality of any federal or state wel-

fare statute or regulation solely on the ground of that doctor's uncertainty or apprehension as to the source or amount of payment to be made for his services. The Missouri statute in question in this case has no effect on a doctor's right to practice his chosen profession but only upon his desire to reap the benefits of welfare Medicaid benefits which might be made to prospective patients. The right of a doctor to maintain suit in such instance has not been, but should be, settled by the United States Supreme Court.

4. The said decision of said Court of Appeals in holding unconstitutional on its face the Missouri statute denying Medicaid payments to otherwise eligible welfare recipients for abortions not medically indicated has created an issue of extreme importance to the right of the several states to determine their internal public policy and to administer internal welfare programs, which legal issue has not heretofor been determined by the United States Supreme Court but which should be finally settled by said United States Supreme Court. In such a case where a federal court has intervened into the internal affairs of a sovereign state and has revoked the validly enacted pronouncement of the public policy of said state, said decision should be brought before the United States Supreme Court for final determination.

WHEREFORE, appellee moves the Court for an order staying the issuance of mandate herein pending the filing by said appellee of a petition for certiorari in the Supreme Court and until final disposition therein of the case.

In support hereof, appellee attaches the statement of counsel.

Respectfully submitted,

JOHN C. DANFORTH
Attorney General

MICHAEL L. BOICOURT
Assistant Attorney General

Supreme Court Building
Jefferson City, Missouri 65101
(314) 751-3321
Attorneys for Appellee

(Certificate of Service Omitted in Printing)

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

SEPTEMBER TERM, 1974

No. 74-1484

George J. L. Wulff, Jr., M.D., and Michael Freiman, M.D.
Appellants,

vs.

The State Board of Registration for the Healing Arts

and

Thomas E. Singleton, Chief of Bureau of Medical Services, Division of Welfare, State Department of Public Health and Welfare,
Appellee.

Appeal from the United States District Court for the Eastern District of Missouri.

January 31, 1975

Motion of appellee for stay of mandate in the above case having been considered by the Court, it is now here ordered that said motion be, and is hereby, denied.

SUPREME COURT OF THE UNITED STATES

No. A-780

THOMAS E. SINGLETON, ETC.,
Petitioner

vs.

GEORGE J. L. WULFF, JR., M.D. AND
MICHAEL FREIMAN, M.D.

ORDER EXTENDING TIME TO FILE PETITION FOR
WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including May 8, 1975.

HARRY A. BLACKMUN
Associate Justice of the Supreme
Court of the United States

Dated this 26th
day of March, 1975.

SUPREME COURT OF THE UNITED STATES

OFFICE OF THE CLERK

WASHINGTON, D.C. 20543

June 23, 1975

Michael L. Boicourt, Esq.
Assistant Attorney General of Missouri
Supreme Court Building
P.O. Box 899
Jefferson City, Missouri 65101

RE: *SINGLETON* v. *WULFF, No. 74-1393*

Dear Sir:

The Court today entered the following order in the above case:

"The petition for a writ of certiorari is granted limited to Questions 1 and 2 presented by the petition which read as follows:

"1. Whether there is a logical nexus between the status of respondent-physicians and the claims they seek to have adjudicated sufficient to confer standing on them to challenge the constitutionality of Section 208.152, RSMo Supp. 1973.

"2. Whether the Court of Appeals acted in excess of its jurisdiction when it proceeded to determine on the merits the constitutionality of Section 208.152, RSMo Supp. 1973."

Mr. Justice Douglas took no part in the consideration or decision of this petition."

Enclosed are memorandums describing the time requirements and procedures under the Rules.

The additional docketing fee of $50, Rule 52(a) is due and payable.

Very truly yours,

MICHAEL RODAK, JR., CLERK
(Mrs.) Helen K. Loughran
Assistant Clerk

Air mail
Encls.

SUPREME COURT, U. S.
FILED
MAY 29 1975
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-1393

THOMAS E. SINGLETON, Chief of Bureau of Medical Services, Division of Welfare, State Department of Public Health and Welfare,
Petitioner,

vs.

GEORGE J. L. WULFF, JR., M.D.,
and
MICHAEL FREIMAN, M.D.,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO "PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT"

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-1393

THOMAS E. SINGLETON, Chief of Bureau of Medical Services, Division of Welfare, State Department of Public Health and Welfare,
Petitioner,

vs.

GEORGE J. L. WULFF, JR., M.D.,
and
MICHAEL FREIMAN, M.D.,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO "PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT"

INTRODUCTION

Come now respondents, GEORGE J. L. WULFF, JR., M.D., and MICHAEL FREIMAN, M.D., plaintiffs in the original action before the United States District Court for the Eastern District, Eastern Division, of Missouri and successful appellants before the United States Court of Appeals for the Eighth Circuit, and pursuant to Rule 24 of this Honorable Court file this, their "Brief" in opposition to the granting of a writ of certiorari in this cause.

ARGUMENT

I

The Appellate Court Correctly and Properly Held That Respondents Had Proper Standing, on Their Own Behalf and on Behalf of Their Pregnant Patients Desiring to Terminate Their Pregnancies, to Challenge the Constitutionality of Missouri Revised Statute, Section 208.152(12)

The Appellate Court correctly and properly determined, without dissent, that respondent physicians had adequate standing to challenge the restrictive state statute, herein challenged. As the Appellate Court so succinctly held,

> "The statute in question interferes with the doctor-patient relationship as it relates to the abortion decision. It injects unnecessarily restrictive rules upon a constitutionally protected decision of doctor and patient as surely as did the statutes in the above cited cases. The statute interferes with the appellants' practice of medicine both professionally and monetarily." (*Wulff*, et al. v. *Singleton*, etc., 508 F.2d 1211, 1214 [8th Cir. 1974]).

It has been repeatedly held in abortion regulation cases that physicians are parties with proper standing before the courts. As early as 1971 the federal court in *Doe*, et al. v. *Scott*, et al., 321 F.Supp. 1385, 1387-1388 (N.D.Ill. 1971) held,

> "[T]he physician-plaintiffs have standing to raise the claims of their patients even if we assume that no independent claim of theirs could withstand a motion for judgment on the pleadings. All plaintiffs thus have standing to raise the claims they assert."

Even more compelling is this Honorable Court's treatment of this very issue in the historic cases of *Roe*, et al. v. *Wade*, 410

U.S. 113 (1973), and *Doe*, et al. v. *Bolton*, et al., 410 U.S. 179 (1973), where it was stated,

> "[T]he physician-appellants, who are Georgia-licensed doctors consulted by pregnant women, also present a justiciable controversy and do have standing despite the fact that the record does not disclose that any one of them has been prosecuted, or threatened with prosecution, for violation of the State's abortion statutes. The physician is the one against whom these criminal statutes directly operate in the event he procures an abortion that does not meet the statutory exceptions and conditions. The physician-appellants, therefore, assert a sufficiently direct threat of personal detriment. They should not be required to await and undergo a criminal prosecution as the sole means of seeking relief." (410 U.S. at p. 188).

The principle of physicians' standing in abortion regulation cases has not been limited by the courts merely to regulations invoking criminal sanctions for noncompliance; but the same principle has been applied equally to cases such as here, where the noncriminal regulation interferes with the protected physician-patient relationship and unconstitutionally inhibits the free election and effectuation of an abortion. (See, *e.g.*: *Doe*, et al. v. *Bellin Memorial Hospital*, et al., 479 F.2d 756 [7th Cir. 1973]; *Nyberg*, et al. v. *The City of Virginia*, et al., 495 F.2d 1342 [8th Cir. 1974], *cert. denied*, 42 L.Ed. 2d 136 [1974]; *Orr*, et al. v. *Koefoot*, et al., 377 F.Supp. 673 [D.Neb. 1974]; *Roe*, et al. v. *Ferguson*, et al., 389 F.Supp. 387 [S.D. Ohio 1974], *reversed on other grounds*, — F.2d — [6th Cir., No. 74-2195, April 28, 1975]; and *Hallmark Clinic*, et al. v. *North Carolina Department of Human Resources*, et al., 380 F.Supp. 1153 [E.D.N.C. 1974]).

The court in *Nyberg*, *supra*, reasoned as follows:

> "We think that the Supreme Court in Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973) and Doe

v. Bolton, 410 U.S. 179, 93 S.Ct. 739, 35 L.Ed.2d 201 (1973) has clearly paved the way for physicians to assert their constitutional rights to practice medicine, which now includes the right to advise and perform abortions. . . .

"The impact of the court's discussion cannot be fairly said to limit standing to sue in abortion cases to pregnant women. Neither can these opinions be read so narrowly as to accord standing only to a physician threatened with criminal prosecution. *See* Doe v. Bolton, *supra* at 188-189 of 410 U.S., 93 S.Ct. 739. Clearly the claims of medical doctors to 'freely practice medicine according to the highest medical standards without arbitrary outside restraints' are inextricably bound up with the privacy rights of women who seek abortions. YWCA v. Kugler, 342 F.Supp. 1048, 1055 (D.N.J.1972). This is sufficient to present a justiciable controversy and confer standing on the physicians who bring this action. . . . Furthermore, the practical effect of the stringent limitation on the use of hospital facilities for performing abortions is to arbitrarily bar the physicians from activities that directly affect their economic interests." (495 F.2d at p. 1344).

In *Nyberg, supra*, the Appellate Court held physicians had the requisite standing to challenge the refusal of a public hospital to allow abortions within their facilities, which policy effectively denied abortions to indigent women. No logical distinction can be drawn between the standing of physicians, on behalf of their indigent patients, to challenge the denial to them of abortions through the arbitrary exclusion of the procedure from the broad range of medical services governmentally offered to indigents at a particular physical facility; and their standing, on behalf of their indigent patients, to challenge the denial to them of abortions through the arbitrary exclusion of the procedure from the broad range of medical services governmentally financed and paid on behalf of indigents. Upon close examination, it is apparent that respondents in the present cause manifest a greater logical nexus than did physician-plaintiffs in *Nyberg, supra*, by reason of their more, direct pecuniary benefit through state financed payment.

This type of a "standing" interest has been held sufficient, time and time again, by this Honorable Court. (See, *e.g., Association of Data Processing Service Organizations, Inc.*, et al. v. *Camp*, etc., et al., 397 U.S. 150, 151-156 [1970]; *Arnold Tours, Inc.*, et al. v. *Camp*, et al., 400 U.S. 45, 46 [1970]; and *Investment Company Institute*, et al. v. *Camp*, etc., et al., 401 U.S. 617, 620-621 [1971]).

> "The question of standing is different. It concerns, apart from the 'case' or 'controversy' test, the question whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question. . . . That interest, at times, may reflect 'aesthetic, conservational, and recreational' as well as economic values. Scenic Hudson Preservation Conf. v. FPC, 354 F2d 608, 616; Office of Communication of United Church of Christ v. FCC, 123 US App DC 328, 334-340, 359 F2d 994, 1000-1006. A person or a family may have a spiritual stake in First Amendment values sufficient to give standing to raise issues concerning the Establishment Clause and the Free Exercise Clause. Abington School District v. Schempp, 374 US 203, 10 L Ed 2d 844, 83 S Ct 1560. We mention these noneconomic values to emphasize that standing may stem from them as well as from the economic injury on which petitioners rely here. Certainly he who is 'likely to be financially' injured, FCC v. Sanders Bros. Radio Station, 309 US 470, 477, 84 L Ed 869, 875, 60 S Ct 693, may be a reliable private attorney general to litigate the issues of the public interest in the present case.

* * * * * * *

> Where statutes are concerned, the trend is toward enlargement of the class of people who may protest administrative action. The whole drive for enlarging the category of aggrieved 'persons' is symptomatic of that trend. In a closely analogous case we held that an existing entrepreneur had standing to challenge the legality of the entrance of a newcomer into the business, because the established business was allegedly protected by a valid city ordinance that protected it from unlawful competition. Chicago v. Atchison, T. & S. F. R. Co." (*Association of Data Processing*, etc., *supra*, at pp. 153-154).

Respondents maintain that their standing is ample and sufficient in this cause. Respondents' claim is primarily based upon the interference here by the state in the constitutionally protected area of the decision regarding abortion between a patient and her physician. The procedure of abortion cannot be viewed in the same light as other medical and surgical procedures. It alone has been afforded constitutional guarantees shared by patient and physician.

Respondents have not only the right but the obligation to protect the rights of their patients. The challenged statute, as evidenced by the reasoning expressed in an unanimous line of cases, voiding identical provisions in other states, must be viewed as part of a larger legislative effort to thwart the free exercise by a woman and her physician of this choice.

Petitioner suggests that the standards enunciated in *Tileston* v. *Ullman*, et al., 318 U.S. 44 (1943), *Barrows*, et al. v. *Jackson*, 346 U.S. 249 (1953), and *National Association for the Advancement of Colored People* v. *State of Alabama*, etc., 357 U.S. 449 (1958), are controlling. ("Petitioner's Writ" [P.W.] p. 9). Respondents suggest instead that the standards of thirty-two (32) years, twenty-two (22) years and seventeen (17) years ago, respectively, have been altered and broadened by the authorities cited herein both *supra* and *infra*.

Respondents, as so found by the Appellate Court, clearly meet the standard prescribed by *Flast*, et al. v. *Cohen*, etc., et. al., 392 U.S. 83, 102 (1968), that there exists "a logical nexus between the status asserted and the claim sought to be adjudicated". Assuming *arguendo* the fact that hypothetical plaintiffs may exist, who also have standing and even an assumed greater "logical nexus", does not preclude respondent physicians from maintaining their own and distinct requisite standing.

This Honoroble Court in *Flast*, *supra*, stated,

> "The various rules of standing applied by federal courts have not been developed in the abstract. Rather, they have been fashioned with specific reference to the status asserted by the party whose standing is challenged and to the type of question he wishes to have adjudicated. We have noted that, in deciding the question of standing, it is not relevant that the substantive issues in the litigation might be nonjusticiable. However, our decisions establish that, in ruling on standing, it is both appropriate and necessary to look to the substantive issues for another purpose, namely, to determine whether there is a logical nexus between status asserted and the claim sought to be adjudicated." (392 U.S. at pp. 101-102).

The physician-respondents demonstrably evidence such a "logical nexus" in various and distinct ways.

First, is the vitality of the inseparability of the doctor-patient relationship into its two component parts. This is particularly true in the area of abortion, where this Honorable Court placed great emphasis upon the physician in stating that,

> "[F]or the period of pregnancy prior to this 'compelling' point, the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that, in his medical judgment, the patient's pregnancy should be terminated." (*Roe*, *supra*, at p. 163).

Secondly, in addition to the physician-patient relationship on the medical level, physicians have a direct pecuniary interest in receiving payment for services rendered. Payments for medicaid assistance are "made *on behalf* of those eligible needy persons" (Emphasis supplied). (Mo.R.S., Section 208.152). The arbitrary and capricious exclusion of abortion from the Missouri medicaid program unduly regulates and interferes with the physician-respondents' practice of medicine.

Thirdly, the joint decision making process between the patient and her physician is impermissibly invaded by the state's flexing of its welfare assistance muscle.

Lastly, is the equitable necessity of allowing physicians to absorb the expenses of time, energy and monies on behalf of their indigent patients, who are often uneducated and incapable of adequately defending these sacred rights in their own stead. The history of cases in which women have been plaintiffs is replete with names like Doe, Roe, Coe, Poe, etc., in an effort to maintain their anonymity as to their public involvement with a highly, emotionally charged issue.

Truly, it cannot be said that respondents have an illogical nexus between the status asserted and the claim sought to be adjudicated. As indicated above, the existence of potential plaintiffs, hypothetically bearing a *more* "logical nexus" than respondents, does not reflect unfavorably upon respondents maintaining a "logical nexus" in their own right.

In the analogous context of lawyer and client, it has similarly been held,

> "At issue in the merits of the case (not yet determined) is the right of members of the Committee to provide effective assistance of counsel to their Indian clients who wish to avail themselves of their Sixth Amendment rights. Appellees' contention that the Committee has not alleged an

> actual injury sufficiently personal to present a justiciable case or controversy cannot stand in light of our decision in Nyberg v. City of Virginia, 495 F.2d 1342, 1344 (8th Cir. 1974), wherein we held that the rights of medical doctors to freely practice medicine are so 'inextricably bound up' with the privacy rights of their patients that the doctors have standing to challenge the validity of abortion laws. *See also* Doe v. Bolton, 410 U.S. 179, 93 S.Ct. 739, 35 L.Ed.2d 201 (1973). With even stronger force it may be said that a lawyer has standing to challange any act which interferes with his professional obligation to his client and thereby, through the lawyer, invades the client's constitutional right to counsel." (*Wounded Knee Legal Defense/Offense Committee*, et al. v. *The Federal Bureau of Investigation*, et al., 507 F.2d 1281, 1284 [8th Cir. 1974]).

One salient fact remains to be noted; petitioner has not cited to this Honorable Court a single abortion regulation case in which physicians were held not to have adequate standing to challenge the attempted infringement of their rights and the rights of their patients, while respondents have cited numerous cases to the contrary.

II

The Appellate Court Correctly and Properly Ruled Upon the Merits of This Cause in Full Accordance With Judicial Equity and Economy; and Petitioner Had More Than Ample Opportunity to Defend Upon the Merits, But Choosing Not to Do So Waived and Foreclosed Himself of the Opportunity Then Presented

Respondents do not quarrel with the general principles of law cited by petitioner, that ordinarily matters will not be

reached on appeal that have not been decided below and that constitutional questions should not be first considered on appeal. (P.W. p. 12). Nevertheless, even those cases cited by petitioner for the former rule clearly recognize the principle not to be an absolute one, but only one applied "ordinarily" (*Eureka-Carlisle Company* v. *Rottman*, etc., 398 F.2d 1015, 1019 [10th Cir. 1968], one the court may choose to follow by "declin(ing)" to reach the merits (*Equal Employment Opportunity Commission* v. *Standard Forge and Axle Company, Inc.*, 496 F.2d 1392, 1394 [5th Cir. 1974]), and one to be discretionally not "considered" (*Fitts* v. *United States of America*, 376 F.2d 516 [10th Cir. 1967]); all cited by petitioner. (P.W. p. 12). In none of the cases cited by petitioner was the questioned, appellate issue in any manner before the District Court. Contrarily, in the instant case the merits were presented directly to the District Court which chose not to confront them.

Similarly, in *Giordano* v. *United States*, 394 U.S. 310 (1969), *Bandy* v. *United States of America*, 396 F.2d 929 (8th Cir. 1968) and *Gardner* v. *Meyers*, et al., 491 F.2d 1184 (8th Cir. 1974), all cited by petitioner (P.W. pp. 12-13), the constitutional issue was never raised nor presented to the District Court. In the present cause the constitutional issue was squarely and exclusively before the District Court.

It has long been a general rule of law that appellate courts in cases involving clear and unequivocal issues, capable of only a singular determination, may decide the matter on the merits rather than remanding the same.

In *Levin* v. *Mississippi River Fuel Corporation*, et al., 386 U.S. 162 (1967) involving a construction of Missouri state law and which arose within the Eighth Circuit, this Honorable Court stated,

> "Indeed, this point is so clear that we see no occasion for remanding the issue to the Court of Appeals for its consideration of the point, even though it be assumed its opinion does not decide it. Effective judicial administration requires that we dispose of the matter here." (386 U.S. at pp. 169-170).

In *Hurwitz*, et al. v. *Directors Guild of America, Incorporated*, 364 F.2d 67 (2nd Cir. 1966), *a case on appeal from an order denying plaintiffs' request for a preliminary injunction*, the Court of Appeals reversed, holding for plaintiffs on the merits.

> "As a general rule, when an appeal is taken from the grant or denial of a preliminary injunction, the reviewing court will go no further into the merits than is necessary to decide the interlocutory appeal. See Ex parte National Enameling & Stamping Co., 201 U.S. 157, 162, 26 S.Ct. 404, 50 L.Ed. 707 (1906); Drittel v. Friedman, 154 F.2d 653 (2 Cir. 1946); Sheldon v. Moredall Realty Corp., 95 F.2d 48 (2 Cir. 1938); 6 Moore, Federal Practice ¶ 54.08 [1] (2 ed. 1965). However, this rule is subject to a general exception—the appellate court may dismiss the complaint on the merits if its examination of the record upon an interlocutory appeal reveals that the case is entirely void of merit. See, e.g., Mast, Foos & Co. v. Stover Mfg. Co., 177 U.S. 485, 495, 20 S.Ct. 708, 44 L.Ed. 856 (1900); Sheldon v. Moredall Realty Corp., supra; 7 Moore ¶ 65.21, at p. 1702 (2 ed. 1955).
>
> Such an exception serves the obvious interest of economy of litigation, and this interest is equally served if the appellate court directs a verdict for plaintiff in an appropriate case. We have found no case reaching this result, but this is not surprising since it is the rare case that contains no triable issue of fact, and it is rarer still that this would result in a judgment for the plaintiff at the pre-trial stage. In Meccano, Ltd. v. John Wanamaker, 250 F. 450 (2 Cir. 1919), aff'd, 253 U.S. 136, 141-142, 40 S.Ct. 453,

64 L.Ed. 822 (1920), we expressly refused to pass upon this question because the plaintiff did not warrant final relief. Finding no reason why the cautious exercise of such a power would be undesirable, we conclude that we may direct the entry of a judgment for the plaintiffs here." (364 F.2d at p. 70).

In point is *The Board of Managers of the Arkansas Training School for Boys at Wrightsville*, et al. v. *George*, et al., 377 F.2d 228 (8th Cir. 1967). The Appellate Court decided the merits on appeal and held,

"It would clearly be a 'contradiction of reason' to attempt to enjoin the state from enforcement of a statute and at the same time not pass upon the constitutionality of the statute. Cf. United States ex rel. McNeill v. Tarumianz, 3 Cir., 242 F.2d 191. Moreover it is not necessary to attack statutes by specific pleading which on their face are unconstitutional. Turner v. City of Memphis, 369 U.S. 350, 82 S.Ct. 805, 7 L.Ed.2d 762.

We are also mindful that the present appeal comes to us on a motion to dismiss with a limited record. *Appellant has not even filed its answer.* We adhere to the proposition that it would be improper to consider 'grave constitutional questions' where there exists 'reasonable likelihood' that further proceedings could help clarify the issues. Borden's Farm Products Co. v. Baldwin, 293 U.S. 194, at 213, 55 S.Ct. 187, 79 L.Ed. 281. However, in the present proceeding no further pleadings or evidence is necessary for 'refinement or clarification of issues.' United States v. Petrillo, 332 U.S. 1, 67 S.Ct. 1538, 91 L.Ed. 1877; United States v. Fabro, Inc., M.D. Ga., 206 F.Supp. 523. And we should dispose of all controversies 'as expeditiously as is consistent with proper judicial administration.' Turner v. City of Memphis, 369

U.S. 350, 82 S.Ct. 805, 7 L.Ed.2d 762." (Emphasis supplied). (377 F.2d at p. 231).

Similarly, is *Word*, et al. v. *Poelker*, etc., et al., 495 F.2d 1349 (8th Cir. 1974), in which an unanimous panel similarly ruled statutory abortion restrictions to be facially unconstitutional, although the cause below had been discussed without a ruling on the merits.

"The issue in this case relates to the facial constitutionality of the St. Louis city ordinance when viewed against the backdrop now available in the *Roe* and *Doe* decisions. That determination can be made on the record before us. We choose to make that determination. See, *Wisconsin* v. *Constantineau*, *supra* at 439 of 400 U.S., 91 S.Ct. 507; Baggett v. Bullitt, 377 U.S. 360, 375-379, 84 S.Ct. 1316, 12 L.Ed.2d 377 (1964)." (495 F.2d at p. 1350).

The Appellate Court in this cause was not unmindful of the prior district court's history regarding abortion litigation in Missouri, nor has this Honorable Court similarly been unaware of same.

Such cases, challenging the constitutionality of state and municipal regulation within the United States District Court for the Eastern District of Missouri, Eastern Division, subsequent to *Roe*, et al. v. *Wade*, *supra*, and *Doe*, et al. v. *Bolton*, et al., *supra*, are pertinent and revealing. (See *e.g.*: *Word*, et al. v. *Poelker*, etc., et al. [municipal regulation of abortion clinics], *dismissed on ground of abstention*, — F.Supp. — [E.D. Mo., No. 73C533(2), Oct. 4, 1973], *reversed on the merits*, 495 F.2d 1349 [8th Cir. 1974]; *Doe*, et al. v. *Poelker*, etc., et al. [public hospitals' prohibition on abortion], *dismissed for lack of standing*, — F.Supp. — [E.D. Mo., No. 73C565 (A), Mar. 22, 1974], *reversed*, 497 F.2d 1063 [8th Cir.

1974], *dismissed on the merits,* — F.Supp. — [E.D. Mo., No. 73C565(A), Jan. 13, 1975], *reversed on the merits,* — F.2d — [8th Cir., No. 75-1069, Apr. 14, 1975]; *Wulff,* et al. v. *State Board of Registration for the Healing Arts,* et al. [medicaid exclusion of benefits for abortion], *dismissed for lack of standing,* 380 F.Supp. 1137 [E.D. Mo. 1974], *reversed on the merits sub nom. Wulff,* et al. v. *Singleton,* etc., 508 F.2d 1211 [8th Cir. 1974]; and *Planned Parenthood of Central Missouri,* et al. v. *Danforth,* etc., et al. [upholding the constitutionality of a recently enacted state statute], — F.Supp. — [E.D. Mo., No. 74-416(A), Jan. 31, 1975], *stayed and enjoined,* 43 L. Ed.2d 389 [No. A-656, Feb. 18, 1975], *docketed,* 43 L.W. 3502 [No. 74-1151, Mar. 12, 1975]).

The tragedy of this legislative pattern and judicial experience is the existence of its provisions during the time necessary to obtain favorable appellate decisions. Every Missouri case to date has been often summarily and always adversely disposed of by the district court and preliminary injunctive relief denied. Every said case has been reversed or enjoined upon appeal.

The rule has always been that "(o)nce a timely appeal is taken from an order made appealable by statute, the power of a court of appeals should be plenary to the extent that it chooses to exercise it" and "once a case is lawfully before a court of appeals, it does not lack power to do what plainly ought to be done." (*Moore's Federal Practice,* Vol. 9, Section 110.25[2], p. 273 [1973]). (See, also, *Mercury Motor Express, Inc.,* et al. v. *Brinke,* 475 F.2d 1086 [5th Cir. 1973]).

The intent and purpose of 28 U.S.C., Section 2281 have not been impaired nor defeated by the action of the Appellate Court, inasmuch as three federal judges have sat in judgment on the constitutional merits involved and no injunction has been issued. Additionally applicable here is this Honorable Court's language that,

"While Section 2281 calls for three judges to enjoin a statute 'upon the ground' of its 'unconstitutionality,' we have held that three judges are not in fact necessary where the unconstitutionality of the statute is obvious and patent . . ." (*Gonzalez* v. *Automatic Employees Credit Union,* et al., 42 L.Ed. 2d 249, 256-257, fn. 14 [1974]).

III

The Appellate Court Correctly and Properly Ruled Upon the Merits of This Cause in Full Accordance With Prior Decisions of This Honorable Court and in Full Accordance With All Other Federal Courts Having Ruled Upon the Same or Analogous Issues

In "Questions Presented" Nos. 3, 4 and 5 of petitioner's "Petition For a Writ" (P.W. pp. 2, 3 and 14-20), petitioner attempts at this stage of the proceedings to argue belatedly the merits of the cause. Although the constitutional merits on appeal were the primary issue, as petitioner well knew, as they were extensively briefed and denominated as "Point I" of *Appellants' Statement, Brief and Argument* filed with the appellate court and duly served upon petitioner, he voluntarily chose not to make nor to defend an argument on the merits before the Appellate Court, either by brief or by oral argument

Seven other federal courts have extensively dealt with abortion regulations in the precise context of welfare payments. In each and every instance, the courts have denounced the denial and exclusion of medical welfare assistance for abortions and have concurrently advanced the rights of the indigent patient to equal protection of the laws and, specifically, to the right of welfare assistance for abortion.

The first case to rule on this exact issue was *Klein*, et al. v. *Nassau County Medical Center*, et al., 347 F.Supp. 496 (E.D. N.Y. 1972), *affirmed sub nom. Ryan*, etc. v. *Klein*, et al., 412 U.S. 924 (1973). In *Klein*, a three judge panel held that a limitation on state Medicaid payments for those abortions which were "*medically indicated*" was constitutionally invalid. That constitutionally void wording is the exact terminology relied upon here by petitioner Singleton to deny in an arbitrary and capricious manner Medicaid assistance payments for otherwise eligible welfare recipients.

The three judge panel in *Klein, supra*, unanimously held,

> "Pregnancy is a condition which in today's society is universally treated as requiring medical care, prenatal, obstetrical and post-partum care, and undeniably it is provided under the Medicaid program as 'necessary' medical assistance although pregnancy is not an abnormal condition, nor does the medical assistance in child birth 'cure' it. Medical assistance for abortion is not less 'necessary' because an election to bear the child would obviate that medical assistance and require instead other, more extensive and more expensive medical assistance. The pregnant woman may not be denied necessary medical assistance because she has made an unwarrantedly disfavored choice, and no other basis appears here for denying medical assistance. Eisenstadt v. Baird, 1972, 405 U.S. 438, 452-453, 92 S.Ct. 1029, 31 L.Ed.2d 349. State law articulates no policy that authorizes disfavoring one choice, and none other than the invalid argument based on the word 'necessary' is advanced. The 1970 amendment to Penal Law, § 125.05, removing the stigma of criminality from abortional acts performed within twenty-four weeks of the commencement of pregnancy, denies to the public authorities in New York any basis, in the administration of the public health services, for

differentiating between the two classes of justified abortional acts defined in the amended statute. Beyond that, it may well be that *a still more fundamental right is infringed whenever an attempt is made by statute or rule to deny, or, as here, substantially to interfere with, the pregnant woman's interests in freely determining whether or not to bear a child.*" Abele v. Markle, D.Conn. 1972, 342 F.Supp. 800, 804.

> *The directive, and the State statute, if interpreted as mandating the Commissioner's directive, would deny indigent women the equal protection of the laws to which they are constitutionally entitled. They alone are subjected to State coercion to bear children which they do not wish to bear, and no other women similarly situated are so coerced. Other women, able to afford the medical cost of either a justifiable abortional act or full term child birth, have complete freedom to make the choice in the light of the manifold of considerations directly relevant to the problem uninhibited by any State action. The indigent is advised by the State that the State will deny her medical assistance unless she resigns her freedom of choice and bears the child. She is denied the medical assistance that is in general her statutory entitlement, and that is otherwise extended to her even with respect to her pregnancy. She is thus discriminated against both by reason of her poverty and by reason of her behavioral choice. No interest of the State is served by the arbitrary discrimination; it reflects no genuine exclusion from benefit by operation of a classification founded on an identifiable state interest served by the denial of medical assistance. Certainly the denial of medical assistance does not serve the State's fiscal interest, since the consequence is that the indigent may then apply for prenatal, obstetrical and post-partum care and for prenatal support for the unborn child. Nor does the denial of medical assistance serve any supposed interest of the State in*

discouraging even justifiable acts of abortion; even if there were assurance that there is such a State interest—and the contrary appears to be the case—it could not be advanced by singling out the indigent for the species of discouragement here attempted. Boddie v. Connecticut, 1971, 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed. 2d 113; King v. Smith, 1968, 392 U.S. 309, 333-334, 88 S.Ct. 2128, 20 L.Ed.2d 1118; *cf.* Eisenstadt v. Baird, *supra*, 405 U.S. at 452-453, 92 S.Ct. 1029, 31 L.Ed.2d 349. (Emphasis supplied). (347 F.Supp. at pp. 500-501).

As noted, *Klein, supra,* was affirmed by this Honorable Court. The applicability of *Klein, supra,* takes on even greater significance in light of the subsequent decisions of *Roe,* et al. v. *Wade, supra,* and *Doe,* et al. v. *Bolton,* et al., *supra,* on January 22, 1973.

In the first medicaid case, post *Roe,* et al. v. *Wade, supra,* and *Doe,* et al. v. *Bolton,* et al., *supra,* the court with Chief Judge Willis W. Ritter, presiding, considered *Doe,* et al. v. *Rose,* etc., 380 F.Supp. 779 (D.Utah, 1973). The case directly concerned the administration of a state Medicaid program in respect to abortions. Defendant, as Executive Director of the Utah State Department of Social Services, had required as a pre-condition for payment that any abortion performed upon a recipient of Medicaid be for "therapeutic" purposes. The court granted plaintiffs' Motion for Summary Judgment, enjoining and prohibiting the defendant, his agents and employees from requiring such a precondition when abortions were performed on eligible Medicaid recipients. In so holding, the court definitively pinpointed the germane issues in its conclusions of law,

"4. Pursuant to the provisions of Section 1396a (a) (10) and (13) of Title 42, U.S.C., the defendant, his agents and employees are required to administer the State Medicaid Plan so as to provide, pursuant to Section 1396d

(a) (1) and (5) of Title 42, U.S.C., in-patient hospital care and necessary physician care to the plaintiffs as Medicaid recipients.

5. The defendant, his agents and employees submitted, pursuant to Section 1396 of Title 42, U.S.C., a Medicaid Program in which they stated that they would provide in-patient hospital care and necessary physician care to the plaintiffs as Medicaid recipients.

6. Each of the plaintiffs has a constitutionally protected right to receive an abortion.

7. Defendant, his agents and employees are without authority, under the provisions of subchapter XIX of the Social Security Act of 1935, as amended, Section 1396, et seq., of Title 42, U.S.C., and in particular, Sections 1396a (a) (10) and (13) and Sections 1396d (a) (1) and (5) of Title 42, U.S.C., to deny to the plaintiffs abortions based upon whether or not they are 'therapeutic.'

8. The plaintiffs will be denied Equal Protection of Law if the defendant, his agents and employees are permitted to discriminate between 'therapeutic' and 'non-therapeutic' abortions in the administration of the Medicaid Program.

9. The defendant, his agents and employees should be enjoined and prohibited from requiring as a precondition for payment that all applications for abortions by Medicaid participants be submitted to the defendant, his agents and employees for approval prior to the performance of said abortions.

10. The defendant, his agents and employees should be enjoined and prohibited from requiring as a precondition for payment that abortions being performed upon Medicaid recipients be 'therapeutic.'

11. The plaintiffs should be awarded the costs of the action." (380 F.Supp. at pp. 781-782).

On June 27, 1974, an unanimous panel of the United States Court of Appeals for the Tenth Circuit affirmed, *Doe* et al. v. *Rose*, etc., 499 F.2d 1112, 1115-1116 (10th Cir. 1974). The court held,

> "We see no need to here review in detail the nature of the federal-state relationship in the broad field of welfare benefits for the indigent. It is sufficient to simply note that a state need not, in the first instance, participate at all in the various federal welfare programs, and that should a state decide to participate, then the degree of its participation is also a matter to be determined by the state. However, once a state elects to participate in a federal welfare program, it must follow federal statutes and regulations and must also administer the program in a constitutional manner. *See* Rosado v. Wyman, 397 U.S. 397, 90 S.Ct. 1207, 25 L.Ed.2d 442 (1970), and King v. Smith, 392 U.S. 309, 88 S.Ct. 2128, 20 L.Ed.2d 1118 (1968). In fact, even a state welfare program funded entirely by the state must be administered in a manner consistent with the United States Constitution.
>
> . . .
>
> Without analyzing in depth Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), and Doe v. Bolton, 410 U.S. 179, 93 S.Ct. 739, 35 L.Ed.2d 201 (1973), a contrary holding in the instant case would in our view fly in the face of those two cases. The Supreme Court's decisions in *Wade* and *Bolton* clearly indicate that in the absence of a compelling state interest a state may not bar all abortions, except those necessary to protect the health of the mother, regardless of the trimester. A statute thus limiting abortions violates the constitutional right to privacy of pregnant women, at least those in their first or second trimesters, who during the first six months of their pregnancy have a qualified right to terminate their pregnancies."

In *Doe* v. *Rampton*, et al., 366 F.Supp. 189 (D. Utah 1973) plaintiffs challenged several Utah statutes which severely restricted the constitutionally protected rights of women, including welfare recipients, to abortion. The statute in question provided in pertinent part,

> "76-7-314. Public assistance grants or state funds not used for abortions—Abortion not a condition to receipt of assistance.—No public assistance grant, medical or otherwise, may be used for an abortion. No state funds may be used, expended or paid for abortions except where an abortion is necessary to save the life of the pregnant woman or to prevent serious and permanent damage to her physical health." (366 F.Supp. at p. 197).

In scrutinizing and assessing the constitutionality of this statute, the three judge court in *Rampton, supra*, authoritatively and unanimously held,

> *"Section 76-7-314 is invalid because it would limit exercise of the right to an abortion by the poor in all trimesters, for reasons having no apparent connection to health of the mother or child. The State may not so use its Medicaid program to limit abortions."* (Emphasis supplied). (366 F.Supp. at p. 193).

The explicit holding in *Rampton, supra*, is worthy of considerable weight in the case at bar and is patently analogous thereto.

Following the solid groundwork laid down in *Klein, supra*, a three judge panel recently upheld the rights of welfare recipients and participants under the Pennsylvania Medical Assistance Program (PMAP) in *Doe*, et al. v. *Wohlgemuth*, et al., 376 F. Supp. 173 (W.D. Penn. 1974), *vacated and remanded on other grounds*, 505 F.2d 186 (3rd Cir. 1974). That suit involved a challenge to the refusal by the Pennsylvania Department of Public Welfare and certain of its officers and/or administrative representatives to provide reimbursement for the costs of abor-

tions for welfare recipients; except in narrowly defined situations where various criterion were met, including "documented medical evidence" that continuation of the pregnancy may threaten the health or life of the mother.

In reaching the merits and holding for the plaintiffs, the District Court in *Wohlgemuth, supra,* stated early in its opinion,

> "Whatever may be the private view of an individual or group of individuals, or the members of this Court, *we are bound by the now established principle of law that a negation of an individual's choice in the matter of abortion during the first trimester of pregnancy is an unwarranted invasion of that person's fundamental rights as established by the Fourteenth Amendment to the Constitution of the United States.*" (Emphasis supplied). (376 F.Supp. at p. 179).

In reaching plaintiffs' claim in *Wohlgemuth, supra,* that Pennsylvania's challenged policies constituted a denial of constitutionally safeguarded rights, the court noted that *Roe,* et al. v. *Wade, supra,* was dispositive of the issues presented and that,

> "[S]ince the PMAP serves to regulate the elective decision of the pregnant woman and her doctor *throughout the three trimesters,* they are too broad and overreach the State's legitimate interest." (376 F.Supp. at pp. 189-190).

Continuing, the *Wohlgemuth* court held, in language of particular pertinence to the instant case,

> "We hold that the State's decision to limit coverage to 'medically indicated' abortions, as arbitrarily determined by it, is a limitation which promotes no valid State interest. In the PMAP, the State has instituted a program to provide benefits to the poor; the State has excluded certain of the poor from the program; the exclusion denies Medical Assistance benefits to otherwise eligible applicants solely because they have elected to have an abortion, and the

> State has been unable to show that the exclusion of such persons promotes a compelling State interest.
>
> • • •
>
> We further conclude that the State may not, by means of any statutes, regulations or procedures similar to those comprising the Pennsylvania Medical Assistance Program, unlawfully impinge upon the fundamental rights of any pregnant woman during the first three months or trimester of her pregnancy.
>
> • • •
>
> It is, therefore, the meaning of this Opinion that the Commonwealth has invidiously discriminated among persons equally eligible for assistance against those who seek medical treatment within the confines of a fundamental right." (376 F.Supp. at pp. 191-192).

Clearly, petitioner Singleton cannot dispute that the denial of Medicaid payments for abortions performed on eligible welfare recipients in Missouri is to any degree either a less invidious discrimination against the indigents of Missouri or a less blatant encroachment into the confines of the well established, fundamental rights of women and their physicians to make and to effectuate the abortion decision free of unwarranted state intrusion. *Roe,* et al. v. *Wade, supra.*

Again in *Roe,* et al v. *Norton,* et al., 380 F.Supp. 726 (D. Conn. 1974) the court voided a Connecticut statute requiring abortions to be "recommended as medically or psychiatrically necessary" for Medicaid payment eligibility. As the court so aptly noted,

> "The choice of service, whether childbirth or abortion, was a matter between patient and physician. Either service is equally eligible for Medicaid payment. The defendants do not contend that the expenses of childbirth are not necessary even though the patient could have elected an abortion. By the same token, the expenses of an abortion are

no less necessary simply because the patient could have elected childbirth.

* * *

While the constitutional right to have an abortion does not necessarily carry with it a constitutional right to a free abortion, a statute that provides payment to the needy for medical expenses would encounter constitutional obstacles if it were construed to weight the choice of a pregnant woman against electing the abortion that is her constitutional right to choose. Government is not required by the Constitution to pay for any medical service, but once it decides to provide payments, it must not unduly disadvantage those who exercise a constitutional right." (380 F.Supp. at pp. 729-730).

Lastly, are *Doe*, et al. v. *Westby*, et al., 383 F.Supp. 1143 (D.S.D. 1974), *vacated and remanded on other grounds*, 43 L.Ed. 2d 648 (1975) and *Doe*, et al. v. *Myatt*, et al., — F. Supp. — (D.N.D., No. A3-74-48, Jan 27, 1975).

The identical issue of finding a denial of equal protection by the state's unconstitutional favoring of broad and inclusive pregnancy and maternity services, excluding only elective abortions, has been unanimously supported in the similar and analogous context of public hospitals. Seven federal and one state appellate courts have so held. (See, *e.g.*: *Doe*, et al. v. *General Hospital of the District of Columbia*, et al., 313 F.Supp. 1170 [D.D.C. 1970], *affirmed*, 434 F.2d 423 [D.C.C. 1970], and *affirmed*, 434 F.2d 427 [D.C.C. 1970]; *Nyberg*, et al. v. *The City of Virginia*, et al., 495 F.2d 1342 [8th Cir. 1974], *cert. denied*, 42 L.Ed. 2d 136 [1974]; *Doe*, et al. v. *Hale Hospital*, et al., 500 F.2d 144 [1st Cir. 1974], *cert. denied*, 42 L.Ed. 2d 837 [1975]; *Doe* v. *Mundy*, et al., 378 F.Supp. 731 [D.Wis. 1974], *affirmed without published opinion*, 510 F.2d 976 [7th Cir. 1975]; *Doe*, et al. v. *Poelker*, et al., — F.2d — [No. 75-1069, 8th Cir., Apr. 14, 1975]; *Santiago* v. *Colon*, et al., —

F.Supp. — [D.P.R., No. 74-362, Aug. 6, 1974]; *Orr*, et al. v. *Koefoot*, et al., 377 F.Supp. 673 [D.Neb. 1974]; and *Roe* v. *Arizona Board of Regents*, — P.2d — [Ariz. Ct. App., No. 2CA-Civ. 1834, Apr. 21, 1975]).

Petitioner cites not a single case to the contrary dealing with the issue at hand—the denial by a state to its citizens of assistance for a broad range of pregnancy and maternity benefits—with the singular and intentional exclusion of any benefits for those women who desire to exercise their constitutional right to terminate pregnancy.

Petitioner by way of arguing the merits, offers too little, too late.

CONCLUSION

In light of the proper course of action taken by the Appellate Court in an effort to promote judicial administration and efficiency in a manner designed to grant fairness to all parties; in light of petitioner's unwarranted refusal to discuss the merits until his inappropriate discussion of the same within his petition for writ of certiorari and in light of the host of and unbroken line of authorities supporting the position of respondents, respondents respectfully pray that petitioner's "Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit" be denied forthwith.

Respectfully submitted

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Certificate of Service

I, the undersigned attorney for respondents and a member of the bar of the United States Supreme Court, do hereby certify that pursuant to Supreme Court Rule No. 33 I have caused to be served true and correct copies of the foregoing "Respondents' Brief in Opposition to 'Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit' " upon each party required to be so served, by depositing said copies in a United States Postal Service mail box, with first class postage prepaid and affixed, addressed to The Honorable John C. Danforth, Attorney General of the State of Missouri, Supreme Court Building, Jefferson City, Missouri 65101 and to Mr. Michael L. Boicourt, Assistant Attorney General of the State of Missouri, Supreme Court Building, Jefferson City, Missouri 65101, Attorneys for Petitioner.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-1393

THOMAS E. SINGLETON, Chief of Bureau of Medical Services, Division of Welfare, State Department of Public Health and Welfare,
Petitioner,

vs.

GEORGE J. L. WULFF, JR., M.D.,
and
MICHAEL FREIMAN, M.D.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENTS' SUPPLEMENTAL BRIEF

In Opposition to "Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit"

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENTS' SUPPLEMENTAL BRIEF

In Opposition to "Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit"

Respondents, GEORGE J. L. WULFF, JR., M.D., and MICHAEL FREIMAN, M.D., respectfully submit this supplemental brief in direct opposition to "Petitioner's Supplemental Brief", served upon respondents this sixth day of June, 1975.

Respondents suggest that the new and additional ground advanced by petitioner for the granting by this Honorable Court of petitioner's Writ of Certiorari (based upon an alleged conflict of decisions between the circuit courts of appeal in *Wulff*, et al. v. *Singleton*, 508 F.2d 1211 [8th Cir. 1974] and *Roe*, et al. v. *Ferguson*, — F.2d — [6th Cir., No. 74-2195, April 28, 1975]) lacks merit and is premised upon a misreading and misapplication of the latter holding. (A copy of the, as yet unreported, decision in *Roe, supra*, has been appended to petitioner's supplemental brief and page references herein to *Roe, supra*, are to said appendix page numbers.)

Wulff, supra, and *Roe, supra*, appear at first blush to contain common elements of facts and circumstances; but, in fact, their procedural and legal groundings are dramatically opposite and conflicting. The resulting opinions are confluent and not contrary.

Plaintiffs' complaint in *Wulff, supra*, challenged the statute solely upon grounds of constitutional infirmities (*Wulff, supra*, at p. 1212). Plaintiffs' complaint in *Roe, supra*, challenged the statute both upon grounds of constitutional infirmities and upon grounds of conflicts with federal legislation (*Roe, supra*, at p. A-3).

The district court proceedings in *Wulff, supra*, were before a three-judge panel, pursuant to 28 U.S.C., Section 2281 (*Wulff, supra*, 380 F.Supp. 1137 [E.D.Mo. 1974]), while the district court proceedings in *Roe, supra*, were before a single district court judge (*Roe, supra*, 389 F.Supp. 387 [S.D. Ohio 1974]).

The appellate court in *Roe, supra*, while disagreeing with the appellate court in *Wulff, supra*, as to whether "the unconstitutionality of this type of statute is so 'obvious and patent' as to obviate the need for a three-judge court" (*Roe, supra*, at p. A-10) merely remanded for convening of a three-judge panel; inasmuch

as the district judge had previously determined "that the constitutional claim is not frivolous nor insubstantial" (*Roe, supra*, at p. A-11). As the appellate court noted, "the issue of substantiality is one to be determined in the first instance by the district judge in whose court the complaint is filed" (*Roe, supra*, at p. A-11).

Respondents respectfully suggest that the only conflict that may exist, if any, is between the appellate court in *Wulff, supra*, and the district court judge in *Roe, supra*, as to substantiality of the claim. Even if the appellate court decision in *Roe, supra*, may be construed to be at odds with the appellate court decision in *Wulff, supra*, as to the substantiality of the constitutional claim, this is not the nature of circuit conflict which merits consideration by this Honorable Court. The circuit panels may also be interpreted as disagreeing on the propriety of deciding the constitutional merits on appeal; but this is a matter of appellate discretion based upon the then prevailing circumstances and factors.

The appellate court in *Wulff, supra*, painstakingly and correctly set forth the principles which prompted it to decide the case on the merits (*Wulff, supra*, at pp. 1214-1215). The appellate court in *Wulff, supra*, had before it the identical and the unanimous line of decisions in *Klein*, et al. v. *Nassau County Medical Center*, et al., 347 F.Supp. 496 (E.D. N.Y. 1972), *affirmed sub nom. Ryan*, etc. v. *Klein*, et al., 412 U.S. 924 (1973), *Doe*, et al. v. *Rose*, etc., 380 F.Supp. 779 (D. Utah 1973), *affirmed*, 499 F.2d 1112 (10th Cir. 1974), *Doe* v. *Rampton*, et al., 366 F.Supp. 189 (D.Utah 1973), *Doe*, et al v. *Wohlgemuth*, et al., 376 F.Supp. 173 (W.D.Penn. 1974), *vacated and remanded on other grounds*, 505 F.2d 186 (3rd Cir. 1974), *Roe*, et al. v. *Norton*, et al., 380 F.Supp. 726 (D.Conn. 1974) and *Doe*, et al. v. *Westby*, et al., 383 F.Supp. 1143 (D.S.D. 1974), *vacated and remanded on other grounds*, 43

L.Ed. 2d 648 (1975). Since the appellate court opinion in *Wulff, supra*, on December 31, 1974, one additional case reaching the identical conclusion was decided (*Doe*, et al. v. *Myatt*, et al., — F.Supp. — [D.N.D., No. A3-74-48, Jan. 27, 1975).

In addition, the appellate court had before it a host of public hospital cases, which although presenting a slightly different factual context, all unanimously supported the identical, equal protection issue on abortion, as decided in *Wulff, supra*. (See, *e.g.*: *Doe*, et al. v. *General Hospital of the District of Columbia*, et al., 313 F.Supp. 1170 [D.D.C. 1970], *affirmed*, 434 F.2d 423 [D.C.C. 1970], and *affirmed*, 434 F.2d 427 [D.D.C. 1970], *Nyberg*, et al. v. *The City of Virginia*, et al., 495 F.2d 1342 [8th Cir. 1974], *cert. denied*, 42 L.Ed. 2d 136 [1974]; *Doe*, et al. v. *Hale Hospital*, et al., 500 F.2d 144 [1st Cir. 1974], *cert. denied*, 42 L.Ed.2d 837 [1975]; *Doe* v. *Mundy*, et al., 378 F. Supp. 731 [D. Wis. 1974], *affirmed without published opinion*, 510 F.2d 976 [7th Cir. 1975]; *Santiago* v. *Colon*, et al., — F.Supp. — [D.P.R., No. 74-362, Aug. 6, 1974]; and *Orr*, et al. v. *Koefoot*, et al., 377 F.Supp. 673 [D.Neb. 1974]).

Since the appellate court decision in *Wulff, supra*, one additional case reaching the identical conclusion was decided (*Doe*, et al. v. *Poelker*, etc., et al., — F.2d — [8th Cir., No. 75-1069, Apr. 14, 1975]).

Lastly, bearing upon the appellate court's decision was the continuing irreparable harm to respondents' indigent patients, particularly in light of the history of abortion litigation within the United States District Court for the Eastern District of Missouri, Eastern Division, subsequent to *Roe*, et al. v. *Wade*, 410 U.S. 113 (1973) and *Doe*, et al. v. *Bolton*, et al., 410 U.S. 179 (1973). See, *e.g.*: *Word*, et al. v. *Poelker*, etc., et al. [municipal regulation of abortion clinics], *dismissed on ground of absention*, — F.Supp. — [E.D.Mo., No. 73C533(2), Oct. 4, 1973], *reversed on the merits*, 495 F.2d 1349 [8th Cir. 1974];

Doe, et al. v. *Poelker*, etc., et al. [public hospitals' prohibition on abortion], *dismissed for lack of standing*, — F.Supp. — [E.D. Mo., No. 73C565(A), Mar. 22, 1974], *reversed*, 497 F.2d 1063 [8th Cir. 1974], *dismissed on the merits*, — F.Supp. — [E.D. Mo., No. 73C565(A), Jan. 13, 1975], *reversed on the merits*, — F.2d — [8th Cir., No. 75-1069, Apr. 14, 1975]. The present cause was dismissed for lack of standing, 780 F.Supp. 1137 [E.D.Mo. 1974] and reversed on the merits at 508 F.2d 1211 [8th Cir. 1974]. Subsequently there has been the experience of *Planned Parenthood of Central Missouri*, et al. v. *Danforth*, et al. [upholding constitutionality of state statute], — F.Supp. — [E.D. Mo., No. 74-416 (C)(A), Jan. 31, 1975], *stayed and enjoined*, 43 L.Ed. 2d 389, No. A-656, Feb. 18, 1975).

Under all of the facts, circumstances, equities and law, duly considered by the appellate court herein below, it acted correctly and properly.

Accordingly, respondents respectfully pray that petitioner's "Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit" be denied forthwith.

Respectfully submitted,

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Certificate of Service

I, the undersigned attorney for respondents and a member of the bar of the United States Supreme Court, do hereby certify that pursuant to Supreme Court Rule No. 33 I have caused to be served true and correct copies of the foregoing "Respondents' Supplemental Brief in Opposition to 'Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit' " upon each party required to be so served, by depositing said copies in a United States Postal Service mail box, with first class postage prepaid and affixed, addressed to The Honorable John C. Danforth, Attorney General of the State of Missouri, Supreme Court Building, Jefferson City, Missouri 65101 and to Mr. Michael L. Boicourt, Assistant Attorney General of the State of Missouri, Supreme Court Building, Jefferson City, Missouri 65101, Attorneys for Petitioner, all this sixth day of June, 1975.

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No. 74-1393

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

THOMAS E. SINGLETON,
Petitioner,

vs.

GEORGE J. L. WULFF, JR., M.D.,
and
MICHAEL FREIMAN, M.D.,
Respondents.

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE PETITIONER

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Respondents.

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINION BELOW

The opinion of the Court of Appeals (App. pp. 65-73), is reported at 508 F.2d 1211 (8th Cir. 1974). The opinion of the District Court (App. pp. 40-58), is reported at 380 F.Supp. 1137 (E.D.Mo. 1974).

JURISDICTION

The judgement of the Court of Appeals was entered on December 31, 1974 (App. p. 64). A timely petition for rehearing, requested by the respondents, was denied on January 9, 1975 (App. pp. 74-80). On March 26, 1975, by order of Mr. Justice Blackmun, the time within which to file a petition for a writ of certiorari was extended to May 8, 1975 (App. p. 88). The petition was filed May 6, 1975, as was granted June 23, 1975 (App. pp 89-90). The jurisdiction of this Court rests on Title 28, U.S.C. Section 1254(1).

QUESTIONS PRESENTED

1. Whether there is a logical nexus between the status of respondent-physicians and the claims they seek to have adjudicated, and whether respondent-physicians are within the zone of interests to be protected by the constitutional guarantees they seek to invoke, sufficient to confer standing on them to challenge the constitutionality of Section 208.152(12), RSMo Supp. 1973.

2. Whether the Court of Appeals acted in excess of its jurisdiction when it proceeded to determine on the merits the constitutionality of Section 208.152(12), RSMo Supp. 1973.

STATUTES INVOLVED

Section 208.152(12), RSMo Supp. 1973:

> "Benefit payments for medical assistance may be made on behalf of those eligible needy persons who are unable to provide for it in whole or in part, with any payments to be made on the basis of the reasonable cost of the care or reasonable charge for the services as defined and determined by the division of welfare unless otherwise hereinafter provided, for the following:
>
> • • •
>
> (12) Family planning services as defined by federal rules and regulations; provided, however, that such family planning services shall not include abortions unless such abortions are medically indicated."

Title 28, U.S.C. Section 1291:

> "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. . . ."

Title 28, U.S.C. Section 2281:

> "An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title. . . ."

STATEMENT OF THE CASE

On November 2, 1973, respondent-physicians filed a three-count Complaint against petitioner Singleton, then designated as Chief of Bureau of Medical Services, Division of Welfare, Missouri State Department of Public Health and Welfare, and the State Board of Registration for the Healing Arts. Only Count II pertained to petitioner Singleton. In Count II, respondent-physicians challenged the validity, under the United States Constitution, of Section 208.152(12), RSMo Supp. 1973. That statutory section excluded non-medically indicated abortions from the range of medical assistance benefit payments, for family planning services, available to eligible needy persons. The complaint requested that the statutory section be declared in violation of the United States Constitution and that the enforcemen thereof be permanently enjoined. Respondents' Complaint requested the convention of a statutory three-judge court. (App. pp. 14-17).

On December 12, 1973, respondent-physicians propounded four (4) interrogatories to petitioner Singleton (App. pp. 22-23), which were answered on January 15, 1974 (except Interrogatory No. 4, to which objection was made). (App. pp. 26-28).

Petitioner Singleton filed his Motion to Dismiss Council II on December 17, 1973, stating four reasons why the complaint should be dismissed, including the following:

> "2. That the plaintiff doctors do not possess the required standing to litigate the constitutional issues raised."

(App. pp. 24-25).

Attached to respondent-physicians' Memorandum In Opposition to Appellee Singleton's Motion to Dismiss, filed

on February 19, 1974, are affidavits from each of the respondent-physicians. (App. pp. 29-32, 33-36).

A statutory three-judge court of the United States District Court for the Eastern District of Missouri entered its Order and Judgment supported by a Memorandum on May 31, 1974, dismissing the entire Complaint, and specifically dismissing Count II of the Complaint on the grounds that respondents lacked standing to challenge Section 208.152 (12). (App. pp. 46-52).

Respondent-physicians duly filed their notice of appeal to the United States Court of Appeals for the Eighth Circuit on June 28, 1974 (App. p. 63).

The United States Court of Appeals for the Eighth Circuit issued its Judgment, and Memorandum in support thereof, reversing the decision of the District Court on December 31, 1974. The Court of Appeals found it had appellate jurisdiction over the appeal; that the respondent-physicians had standing to adjudicate the constitutionality of the state statute in question; that the Court of Appeals had jurisdiction, for the first time on appeal, to reach the merits of the constitutionality of the state statute in question; and that the state statute was facially unconstitutional (App. pp. 65-73).

The respondent-physicians filed a motion for rehearing, asking for clarification and an award of attorneys' fees, on January 6, 1975. (App. pp. 74-80). The Court of Appeals denied the Motion for Rehearing on January 9, 1975. (App. pp. 81-82).

Petitioner's Motion for Stay of Mandate (App. pp. 83-86), was denied by the Court of Appeals on January 31, 1975 (App. p. 87).

Mr. Justice Blackmun granted petitioner an extension

of time to file his petition for writ of certiorari to and including May 8, 1975, on March 26, 1975. (App. p. 88).

The petition for writ of certiorari was docketed in the United States Supreme Court on May 6, 1975, and the petition was granted on June 23, 1975. (App. pp. 89-90).

SUMMARY OF ARGUMENT

1. Respondents, claiming status as licensed physicians desiring to perform abortions on women qualifying as needy persons eligible for state Medicaid assistance, are without standing to adjudicate the constitutionality of a state statute excluding abortions, unless medically indicated, from family planning services reimbursable by Medicaid assistance. This Court, in numerous cases, has promulgated a number of yardsticks by which to measure the existence of standing. These yardsticks, or tests, have become increasingly exclusive during the last decade and a half. Proceeding from *Baker* v. *Carr*, 369 U.S. 186 (1962), through *Flast* v. *Cohen*, 392 U.S. 83 (1968), *Association of Data Processing Service Organizations* v. *Camp*, 397 U.S. 150 (1970), and finally to *Warth* v. *Seldin*, ____ U.S. ____, 43 L.W. 4906, it is apparent that respondents' standing cannot be supported by reference to any of the tests propounded by the Court. Moreover, respondents' standing becomes less tenable as one progresses through the most recent standing cases.

Respondents do not have the requisite "personal stake" in the constitutionality of the challenged statute. That "personal stake" belongs to the pregnant women denied medical reimbursement for non-therapeutic abortions. The statute in question does not subject respondents to criminal sanctions, nor does it decline to them the right to perform an abortion. Respondents claim only an uncertainty as to the future source of payment for abortions performed on prospective patients.

Likewise, there is no "logical nexus" between the status of respondent-physicians and the constitutional claims they raise. It is only pregnant women who are denied Medicaid assistance by operation of the challenged statute, and it is only pregnant women who can claim a connection between that denial and their right to privacy and to be afforded the equal protection of the law.

As an even more formidible barrier to the respondents' standing, whatever personal detriment they may incur by operation of the challenged statute is not within the "zone of interest" protected by the various constitutional provisions under which they claim the statute to be unconstitutional. The constitutional right to privacy, construed by this Court in *Roe* and *Doe* to include the right of a woman to terminate her pregnancy, does not extend to a doctor's interest in receiving Medicaid funds, nor does the Equal Protection Clause protect persons not themselves the subject of "invidious discrimination".

And, finally, respondents have not pointed to a specific concrete instance in which they have been deprived compensation for their services or have been unable to perform an abortion by reason of the challenged statute. The respondents' complaint is totally devoid of allegations of "demonstrable, particularized injury." Also, respondents have alleged no causal connection between the challenged statute and injury which the respondents may incur. It is the decision of the pregnant woman whether to have an abortion which determines a physician's ability to perform the operation or be compensated for it.

2. On appeal from an order by a statutory three-judge district court dismissing a complaint for lack of standing, the Court of Appeals had no jurisdiction to reach the merits of the respondents' claim that the challenged state statute

is unconstitutional. Title 28, U.S.C. Section 2281 requires that a three-judge court be convened, before a state statute may be found unconstitutional, where a complaint alleges the unconstitutionality of the statute, a state officer is named as a party, and injunctive relief is sought. All of those elements were present in Count II of respondents' Complaint. Therefore, only a three-judge district court has statutory authority to reach the merits of respondents' constitutional claims.

Despite the fact that Congress, pursuant to Article III of the Constitution, conferred only appellate jurisdiction on the Courts of Appeal, the Eighth Circuit exercised original jurisdiction to reach the constitutionality of the challenged statute although the required three-judge court had not reached that issue. The rule that any appellate court should not consider, for the first time on appeal, constitutional questions is patently applicable to the present case because this Court has never considered whether a state must give financial assistance to an eligible welfare recipient for an elective surgical procedure, i.e., non-therapeutic abortion.

Given a like opportunity to issue a decision of constitutional import on an almost identical state statute, the United States Court of Appeals for the Sixth Circuit, specifically stating its opposition to the result reached by the Eighth Circuit, correctly remanded constitutional claims concerning a welfare abortion statute for resolution by a three-judge district court. *Roe* v. *Ferguson,* 515 F.2d 279 (6th Cir. 1975).

The court below took unto itself original jurisdiction to determine the constitutionality of a state statute which issue had not been taken up, nor decided, by the three-judge district court from which the appeal was taken. To that extent, the Eighth Circuit perverted the statutory scheme which Congress has conferred jurisdiction on the several levels of federal courts.

ARGUMENT

I

The respondent-physicians are not proper parties to request an adjudication relating to the constitutionality of Section 208.152(12), RSMo Supp. 1973, because they do not have sufficient personal stake in the constitutionality of that state statutory section to assure the degree of concrete adverseness necessary before a federal court may exercise its Article III powers, nor are the interests of the respondent-physicians in the constitutionality of the state statutory section within the zone of interests protected by the constitutional guarantees on which the respondent-physicians rely.

Section 208.152(12), RSMo Supp. 1973, insofar as here pertinent, excludes abortions not medically indicated from the range of family planning services for which the State of Missouri will make benefit payments for medical assistance on behalf of eligible needy persons. In their complaint filed in the United States District Court for the Eastern District of Missouri on November 2, 1973, the respondent-physicians alleged that this Missouri statutory section "is in violation of the constitutional rights of plaintiffs and their patients, as protected and guaranteed by the First, Fourth, Fifth, Eighth, Ninth and Fourteenth Amendments to the United States Constitution." (App. pp. 16-17). This court has granted certiorari to determine whether the respondent-physicians have the requisite standing to assert the unconstitutionality of the state statute in the federal courts. As a result, we are not concerned whether the issue presented by the respondent-physicians, as an abstract matter, is itself justiciable, but rather whether the physicians who have filed this particular suit are proper parties to request an adjudication concerning the constitutionality of Section 208.152(12), RSMo Supp. 1973. *Flast* v. *Cohen,* 392 U. S. 83, 99 (1968). It is respectfully submitted that the

opinion of the three-judge district court, later reversed by the Court of Appeals, was correct in holding that the respondent-physicians lacked the requisite standing to allege the unconstitutionality of the state statute herein questioned.

> "Keeping in mind that it is the welfare recipient in whose behalf medical assistance payments under R. S. Mo. 208.152 are made and that it is the welfare recipients and not their physicians who have a right to a hearing if their medical assistance claims are denied, and that the plaintiff-physicians are not prohibited from performing abortions, this Court finds that the standing requirement of *Flast* v. *Cohen*, 392 U.S. 83, 102, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968), that there be a logical nexus between the status asserted by the plaintiffs and the claim they seek to have adjudicated is not satisfied by the litigative posture of the plaintiff-physicians herein, and, therefore, they lack standing to challenge the constitutionality of the statute in question here."

(App. p. 52; 380 F.Supp. 1137, 1144 (E.D.Mo. 1974).)

In their complaint, respondents claim status as licensed physicians (App. pp. 10, 11), the members of a class

> "... consisting of duly licensed physicians and surgeons presently performing or desiring to perform abortions upon women, minors and adults, eligible for Missouri State Medicaid assistance and payments except as restricted or prohibited by the statutory wording, herein challenged." (App. p. 15).

In fact, Section 208.152(12) includes no restriction on the performance of abortions by licensed physicians and surgeons. It is clear that the only interest that respondents have in the constitutionality of this state statutory section is a desire that public funds be used to reimburse them

for abortion operations they may perform in the future on women otherwise eligible for state Medicaid assistance. The respondent-physicians are seeking to expand the range of circumstances which will, in the future, enable them to feed at the public trough.

Standing, as a legal concept, is not an easy subject of standardization. A case by case analysis of individual complainants and the facts which they allege create a cause of action is a necessary prerequisite to standing determinations. Nevertheless, this court has made numerous attempts in recent years to establish guidelines or tests whereby the existence of standing in a particular case can be analyzed. These tests have become increasingly exclusive. For example, in *Baker* v. *Carr*, 369 U.S. 186 (1962), Tennessee voters were found to have standing to allege the unconstitutionality of state apportionment which resulted in inequality of representation. The Court defined the test for determining the existence of standing as follows:

> "A federal court cannot 'pronounce any statute, either of a State or of the United States, void, because irreconcilable with the Constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies.' (citation omitted) Have the appellants alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions?"

Baker v. *Carr*, *supra* at 204.

In *Baker* v. *Carr*, the plaintiff-voters had the requisite personal stake in the constitutionality of a state statute providing for the representation of voters because that statute provided representation to the plaintiffs which was more diluted than the representation it provided to

voters in less populous districts. There is no analogy which can be taken from *Baker* v. *Carr, supra,* which would assist the respondents in the present case in establishing their standing to allege the unconstitutionality of the Missouri welfare abortion statute. As will be developed later, Section 208.152(12), RSMo Supp. 1973 provides Medicaid for eligible needy persons and is not designed or developed with any intention whatsoever to benefit individuals licensed to practice medicine in the State of Missouri. The plaintiffs in *Carr* had a personal stake in the constitutionality of a statute designed to provide them representation but which did so in a discriminatory matter. The respondents in this lawsuit have no personal stake in a statute designed to provide Medicaid assistance on behalf of eligible needy persons, except where such medical assistance would include non-therapeutic abortions. In addition, respondents are subjected to criminal prosecution by reason of the challenged statute. If they were they might qualify under the *Baker* v. *Carr* test. *Doe* v. *Bolton,* 410 U.S. 179, 188 (1973).

The Court also attempted to give substance to the abstract concept of standing in *Flast* v. *Cohen,* 392 U.S. 83 (1968). Although *Flast* is a taxpayer's standing case and should be considered in that framework as not totally analogous to any standing issue not involving taxpayers, the district court relied on the test enunciated in *Flast* v. *Cohen* to dismiss respondent's complaint against petitioner and the Court of Appeals relied partially on *Flast* in overruling the three-judge district court. The test for standing enunciated in *Flast* v. *Cohen, supra,* which has since been much quoted, requires the court

> "to look to the substantive issues for another purpose, namely, to determine whether there is a logical nexus between the status asserted and the claim sought to be adjudicated."

Flast v. *Cohen, supra* at 102.

As stated *supra,* the respondents allege status as licensed physicians (App. pp 10, 11)

> "presently performing or desiring to perform abortions upon women, minor and adult, eligible for Missouri State Medicaid assistance and payments." (App. p. 15).

The clam which the respondents seek to have adjudicated is that the Missouri state statute excluding abortions, not medically indicated, from the range of family services for which the state will pay Medicaid assistance is unconstitutional on several distinct grounds. (App. pp. 12-13).

The respondents first assert that the challenged state statute is unconstitutionally vague and uncertain (paragraph 9(a) of Complaint.) This allegation is meaningless absent the assertion of a logical connection or nexus.

The respondents then allege that the challenged state statute unconstitutionally denys them and their patients of the right to privacy. (Par. 9(b)). However, the constitutionally guaranteed right to privacy has no logical nexus to a licensed physician who may in the future want to be the ultimate recipient of public funds paid to an eligible welfare recipient choosing to terminate her pregnancy. The constitutional right to privacy guarantees only that the *pregnant woman* may choose to terminate her pregnancy within the first tri-mester following conception. We quote from *Roe* v. *Wade,* 410 U.S. 113, 152-153 (1973):

> "The Constitution does not explicitly mention any right of privacy. In a line of decisions, however, going back perhaps as far as Union Pacific R. Co. v. Botsford, 141 U.S. 250, 251, 35 L.Ed. 734, 11 S.Ct. 1000 (1891),

the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. In varying contexts, the Court or individual Justices have, indeed, found at least the roots of that right in the First Amendment (citation omitted); in the Foutrh and Fifth Amendments (citations omitted); or in the concept of liberty guaranteed by the first section of the Fourteenth Amendment (citation omitted). These decisions make it clear that only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty,' Palko v. Connecticut, 302 U.S. 319, 325, 82 L.Ed. 288, 58 S.Ct. 149 (1937), are included in this guarantee of personal privacy. They also make it clear that the right has some extension to activities relating to marriage (citation omitted); procreation (citation omitted); contraception (citations omitted); family relationships (citation omitted); and child rearing and education (citations omitted).

> This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."

The court went on to point out several types of personal detriments which could accrue to the pregnant woman should she not be allowed to decide in favor of an abortion. The standing which the court determined the physicians to have in the companion case to *Roe* v. *Wade, supra,* was not based on the right to privacy, but rather on the personal detriment a physician could incur by prosecution under a criminal abortion statute. *Doe* v. *Bolton,* 410 U.S. 179, 188 (1973).

The respondents also allege that the challenged state statute constitutionally deprives them of their right to practice medicine according to the highest standards of medical practice. (Par. 9(c) Complaint). In the first place, the petitioner respectfully submits that there is no recognized constitutional right to practice medicine according to certain standards of medical practice. Under *Flast,* it is certainly required that a challenged statute must be in regard to conduct specifically prohibited by a constitutional prohibition before standing can accrue. Secondly, it is ridiculous to assert that the lack of public reimbursement to eligible needy persons for non-therapeutic abortions could have any effect on the standard of medical practice exercised by the respondents. Do respondents suggest that surgical operations not reimbursable from public funds will be performed with has professional acumen?

The respondents' complaint additionally alleges that the challenged state statute denies to respondents' patients the constitutional right to determine whether to bear children. (Par. 9(d) Complaint.) As will be thoroughly discussed *infra,* the respondents have no standing to allege the constitutional rights of third persons.

Respondents' complaint next alleges that the challenged state statute infringes upon their constitutional right to render and their patient's right to receive safe and adequate medical advice and treatment pertaining to the decision whether to carry a pregnancy to term (Par. 9(e) Complaint). It is clear upon the face of respondents' complaint, however, that the challenged statute has nothing whatsoever to do with the respondent-physician's right to render advice and treatment concerning whether to perform an abortion. Taking the Complaint as a whole, including the challenged statute which is included therein, it is clear that the statute does not interfere with the respondent's right

to perform an abortion but only may create some uncertainty as to the source of payment for that abortion once it has been performed.

The respondents' complaint also alleges that they and their patients are being denied the equal protection of the laws (Par. 9(f) Complaint). Indeed, the court below, when it reached the merits, based its decision finding the challenged statute unconstitutional primarily on equal protection grounds. (App. p. 72) However, it is the pregnant woman choosing a non-therapeutic abortion who, according to the court below, is being treated differently than the pregnant woman choosing to bring her pregnancy to term or qualifying for a therapeutic abortion. The respondents do not allege that they, or any other doctor, is in any way subjected to invidious discrimination which is the result of a statute which excludes non-therapeutic abortions from the range of family services for which the State of Missouri will extend Medicaid assistance.

Paragraph 9(g) of the respondents' Complaint suffers from the very problems of vagueness and uncertainty alleged by respondents to afflict the challenged state statute. As is true with all of the specifications which respondents' complain alleges create a cause of action, this particular subparagraph is merely a conclusionary statement of the law totally devoid of specific references to the challenged statute or explanation of how that statute results in the alleged constitutional infirmities. Taking cognizance of the concept that factual allegations in the complaint should be taken as true for purposes of a motion to dismiss, nevertheless the challenged state statute here in question, under no stretch of the imagination, could expose the respondents to "the threat of great civil liability and loss of property, liberty and occupation. . . ." Apparently, the respondents are trying to manufacture a direct detriment sufficient

to secure their standing under *Doe* v. *Bolton,* 410 U.S. 179 (1973), which held that physicians who were the potential subjects of criminal prosecution had standing to prosecute criminal abortion statutes. In this case, however, the respondents' complaint attacks a statute concerned only with the exclusion of state medical assistance for a particular type of surgical procedure. It does not provide sanctions against anyone, including respondents.

In the last of the alleged constitutional deprivations included in their complaint, the respondents have come closest to alleging the existence of a constitutional claim having a logical nexus to their status as licensed physicians (Par. 9(h) Complaint). Respondents allege that the challenged state statute infringes upon the right of a physician, during the first tri-mester following conception, to make the abortion decision on behalf of a pregnant patient contrary to the due process clause of the Fourteenth Amendment. However, the respondents are still attempting to allege a right belonging to their prospective patients rather than to themselves. It is the pregnant woman which *Roe* v. *Wade, supra,* and *Doe* v. *Bolton, supra,* gave the constitutional right to choose an abortion, under limited circumstances, as an incident to the woman's right to privacy. The physician has no constitutional right to make an abortion decision on behalf of a pregnant patient.

There is no logical nexus between the status of the respondents in this case and the various claims which they seek to have adjudicated. *Flast* v. *Cohen, supra.* Likewise, the respondents do not have such a personal stake in the constitutionality of challenged state statute as to guarantee the concrete adversement spoken of in *Baker* v. *Carr,* 369 U.S. 186 (1962). The respondents are actually attempting to represent the interests of prospective patients, otherwise eligible for Medicaid assistance, who may in the future desire a non-therapeutic abortion in the State of Missouri.

Even more fatal to the existence of standing in this lawsuit is the test adopted by this Court in the companion cases of *Association of Data Processing Service Organizations Inc.* v. *Camp,* 397 U.S. 150 (1970); and *Barlow* v. *Collins,* 397 U.S. 159 (1970). The court states this new test as follows:

> "The question of standing is different. It concerns, apart from the 'case' or 'controversy' test, the question whether the interest sought to be protected by the complainant is arguably within the zone of interest to be protected or regulated by the statute or constitutional guarantee in question." *Association of Data Processing Service Organizations Inc.* v. *Camp, supra* at 153.

As more clearly enunciated in *Barlow* v. *Collins, supra,* these two cases have actually given us a double-barreled test as a tool in standing matters. First, the complainants must have the personal stake and interest to provide the concrete adverseness required by Article III. This is essentially the test in *Baker* v. *Carr, supra,* and very little removed, exception by language, from the test employed in *Flast* v. *Cohen, supra.* Secondly, the complainant must be clearly within the zone of interests protected by the statute or constitutional guarantee relied upon in alleging a cause of action. *Barlow* v. *Collins, supra* at 164. The test propounded by the court in *Baker* v. *Carr, supra,* and *Flast* v. *Cohen, supra,* have been discussed. But the "zone of interest" test, which *Association of Data Processing Service Organizations Inc.* v. *Camp, supra,* and *Barlow* v. *Collins, supra,* add to the litany of legal precedent concerning standing, creates an even more affective barrier to the respondents in this case. It is doubtful that the respondents have sufficient standing to maintain this lawsuit under the test in *Flast.* It is certain that the respondents lack the

standing to maintain this lawsuit under the test announced in the *Data Processing* case. In his dissenting opinion to *Data Processing* and *Barlow,* Mr. Justice Brennan asserts that the "zone of interests" test has created yet a second condition to the existence of standing in the federal courts. *Id.* at 168. We agree.

Without again waltzing through the various allegations of unconstitutionality included in the respondents' complaint, the constitutional guarantees on which respondents rely can be reduced to three general allegations: That the challenged state statute interferes with the right to privacy guaranteed through the United States Constitution; that the challenged state statute is in violation of the equal protection clause of the Fourteenth Amendment; and that the challenged state statute deprives the respondents of a constitutional right to practice medicine.

The court recognized in *Roe* v. *Wade, supra,* and *Doe* v. *Bolton, supra,* that a pregnant woman has a limited right to choose an abortion pursuant to the constitutional right to privacy. These cases protect the woman's right to privacy and in no way extend the constitutional right to privacy to a physician who, in the future, may desire to perform abortions on women otherwise eligible for state Medicaid assistance except for the prohibition of Section 208.152(12), RSMo Supp. 1973. The interests of respondents are not within the zone protected by the constitutional right to privacy.

The court below, in reaching the merits, declared that:

> "We find it unnecessary to review again *Roe* and *Doe* or what this court has said in applying those cases. Suffice it to say that the statute here provides medical payments if the pregnancy is carried to term or for therapeutic abortions but not if a non-therapeutic abortion is performed. This classification is a clear

violation of the Equal Protection Clause of the Fourteenth Amendment." (App. p. 72).

Under the theory of the court below, it is clear that it is the pregnant prosective welfare recipient who is the subject of discrimination. The statute in question in no way discriminates against physicians. Any qualified physician may perform an abortion within the limitations set forth in *Roe* and *Doe*. The equal protecton clause protects only those who are actually discriminated against.

The court below largely predicated its fnding that the respondents in this matter did have standing on two of its own cases, *Nyberg* v. *City of Virginia,* 495 F.2d 1342 (8th Cir. 1974), *cert. den.* 419 U.S. 891, 42 L.Ed.2d 136, 95 S.Ct. 169 (1975), and *Word* v. *Poelker,* 495 F.2d 1349 (8th Cir. 1974). These cases relate to the alleged constitutional right to practice medicne. In both cases, the Eighth Circuit found that *Roe* and *Doe* justified the deduction that physicians had a constitutional right to practice medicine including the right to advise and perform abortons. In *Nyberg,* the Eighth Circuit found unconstitutional a municipal hospital resolution prohibiting the use of hospital facilities for non-therapeutic abortions. In *Word,* the Eighth Circuit found unconstitutional a city ordinance regulating and licensing abortion clinics. *Word* did not specifically deal with standing. However, in *Nyberg,* the court below found that physicians had standing to assert the unconstitutionalty of a resolution which denied to them the use of hospital facilities to perform abortions, thereby interfering with their right to practice medicine. The court below found that this conclusion was dictated by *Roe* and *Doe*. In fact, those cases involved the standing of a doctor who is potentially subject to criminal prosecution for violation of a criminal abortion statute. It requires a much further step, which the Eighth Circuit took in *Nyberg* to find that

a physician has standing to force a hospital to allow him to perform abortions with hospital facilities. It is even more illogical to take the further step, which respondents ask that we do in this case, to find that a physician has standing to force a state to pay Medicaid assistance to indigent pregnant mothers for the purpose of abortion. *Roe* and *Doe* should not and cannot be distorted to that extent. Assuming, *arguendo,* that the Eighth Circuit was correct in its decision in *Nyberg,* it does not follow that the respondents in this case have standing to allege the unconstitutionality of the challenged state statute. The statute in question does not restrict respondents, as did the resolution in *Nyberg,* from performing abortions. The statute in question does not deny the respondents the opportunity to receive compensation for abortion services they may perform in the future. The challenged statute only provides that the State of Missouri will not reimburse welfare recipients for abortion services performed.

Licensed physicians desiring that prospective patients be eligible to receive Medicaid assistance for non-therapeutic abortions cannot be considered to be within the zone of interest protected by any of the constitutional guarantees which could be relied upon to declare Section 208.152(12), RSMo Supp. 1973, unconstitutional. To hold otherwise would expand standing, and the "zone of interests" test, to a ridiculous extreme and overburden this court with controversies laden with improper parties. If these respondent-physicians have standing, then it logically follows that the landlord of pregnant woman, eligible for Medicaid assistance, could challenge this state statute on the ground that if the woman has to pay a doctor for an abortion with her own funds, rather than with public funds provided by the state, she will not be able to pay her rent to the landlord. The standing test promulgated by this court in *Association of Data Processing Service Organizations Inc.* v.

Camp, supra, and *Barlow* v. *Collins, supra,* preclude the respondents in this case from having standing to assert the unconstitutionality of the challenged state statute.

That the respondent-physicians herein are not proper parties to assert the constitutional matters included in their Complaint is also made clear by the substance of the challenged statute and of the overall Medicaid framework of which it is a part. As emphasized by District Court (App. p. 47), Section 208.152(12), RSMo Supp. 1973, provides for the payment of medical assistance benefits "on behalf of those eligible needy persons who are unable to provide for in whole or in part. . . ." Not only are payments made on behalf of eligible persons, but only the welfare recipient is granted a right to a hearing when a claim for medical reimbursement is denied. A doctor is not granted a right of appeal. See Title 45, Code of Federal Regulations, Public Welfare, Chapter II, Section 205.10 (Revised as of October 1, 1973), and Section 208.156, RSMo 1969. Therefore, eligible needy persons are the intended beneficiaries of the statutory scheme of which Section 208.152 is a part; eligible needy persons are the people hurt by the operation of any restriction placed on the payment of medical assistance benefits because they are not provided the needed cost reimbursements; and welfare recipients are the ones given a statutory right to appeal adverse determinations. Obviously, it is the pregnant woman, otherwise eligible for Medicaid assistance, who is the proper party to challenge this state statute.

Likewise, the respondents cannot establish standing on the basis they are representing the rights of their patients. Not having standing in their own right to challenge Section 208.152, respondents may not bring this action on behalf of their patients to protect their patients' fundamental rights. *Tileston* v. *Ullman,* 318 U.S. 44, 46 (1943).

The general rule under *Tileston,* that only those persons having constitutional rights should be able to assert those rights in the federal courts, can be avoided only where the complaining parties have clear and obvious standing on their own behalf, as, for example, being subject to criminal prosecution, *Griswold* v. *Connecticut,* 381 U.S. 479, 481 (1965), and *Doe* v. *Bolton,* 410 U.S. 179, 188 (1973), or where the parties whose rights are to be represented cannot advance those rights on their own behalf as in *Barrows* v. *Jackson,* 346 U.S. 249, 257 (1953), and *N.A.A.C.P.* v. *Alabama,* 357 U.S. 449, 459 (1958). In the instant case, the respondents do not have standing in their own right, are not subject to prosecution by reason of the existence of Section 208.152, and therefore cannot acquire standing under the exception of *Griswold* v. *Connecticut, supra.* Also, the indigent women which Section 208.152 was intended to benefit are fully able to advance their own rights. For example, in *Klein* v. *Nassau County Medical Center,* 347 F.Supp. 496, 498 (E.D.N.Y. 1972), all plaintiffs were pregnant at the time they became plaintiffs; all plaintiffs had applied at different times for an abortion; all plantiffs asserted that they could not afford abortions; all plaintiffs up to the time they filed suit had been unable to obtain an abortion; and all plaintiffs alleged that they were indigent.

The principle that a party may vindicate only his own constitutional rights but may not seek vindication for the rights of third parties is still a viable principle of standing. *Moose Lodge No. 107* v. *Irvis,* 407 U.S. 163 (1972); and *Sierra Club* v. *Morton,* 405 U.S. 727 (1972).

The petitioner especially directs the attention of the court to its latest opinion on the subject of standing. *Warth* v. *Seldin,* No. 73-2024, decided on June 25, 1975, 43 L.W. 4906. The denial of standing to several groups of plaintiffs

and intervenors in that case, each asserting a distinct status, leads inextricably to the conclusion that the court is not predisposed toward relaxing traditional standing requirements. If anything, *Warth* indicates that the court will even more jealously, than has been the case in the past, guard its docket, and that of the lower federal courts, against lawsuits instituted by improper plaintiffs. In *Warth*, four kinds of plaintiffs tried to attack the constitutionality of the zoning ordinance of Penfield, a suburb of Rochester, New York. It was alleged that the purpose and effect of the zoning ordinance, and its enforcement, was to deny persons of low and moderate income from the right of living in Penfield. Injunction, declaratory relief, and damages were sought. This court found that none of the plaintiffs had standing.

One group of plaintiffs challenging the Penfield zoning ordinance consisted of a group of Rochester residents of low or moderate income belonging to minority racial or ethnic groups. These plaintiffs, in conclusory terms, alleged that they were excluded from living in Penfield due to the discriminatory ordinance which had the effect of precluding low or middle income housing from being built in that surburban area. The Court held that:

> "... [A] plaintiff who seeks to challenge exclusionary zoning practices must allege specific, concrete facts demonstrating that the challenged practices harm *him*, and that he personally would benefit in a tangible way from the courts' intervention."

Warth v. *Seldin*, 43 L.W. at 4911.

The plaintiffs in *Warth* failed to allege any particular proposed construction project which they would have qualified to live in. They did not allege a single instance in which the housing ordinance, or its enforcement, had the specfic result of denying them access to housing in Penfield.

In other words, the plaintiffs in that case failed to allege specific facts showing that, absent the existence of the Penfield zoning ordinance and its enforcement, they would have been able to find housing in Penfield. Rather, the plaintiffs in *Warth* claimed that

> "... respondents' enforcement of the ordinance against third parties—developers, builders, and the like—has had the consequence of precluding the construction of housing suitable to their needs at prices they might be able to afford." *Warth* v. *Seldin*, 43 L.W. at 4910.

This is very similar to the position of respondents in the present case. In effect, the respondents claim that the existence of a statute excluding non-therapeutic abortions from qualification for Medicaid reimbursement may have the result of precluding pregnant welfare recipients from choosing abortions with the further result that respondents will not be paid for surgery not performed. As in *Warth*, the respondents herein have not alleged the existence of a single woman for whom the respondents performed an abortion which was not paid for, the existence of a single woman who decided against abortion because of the existence of the Missouri statute, or any facts to indicate that, absent the Missouri statute, they would have performed more abortions or have made more money.

The court also held that taxpayers of Rochester lacked standing. The claim of this group of plaintiffs in *Warth* was that the existence of Penfield's discriminatory zoning ordinance required the city of Rochester to bear a larger proportion of the cost of providing housing and services to persons of low and moderate income than would otherwise have been the case. The court first expressed a doubt that this group of plaintiffs can even establish the existence of personal detriment much less the second spoke of the test of the *Data Processing* case that a specific con-

stitutional guarantee include their interest. The court pointed out that the injury complained of, increases in taxation, did not result from the existence of the Penfield zoning ordinance but was the result of taxing decisions made by Rochester officials. This Court clearly inferred that a causal connection is a necessary pre-condition to standing. By analogy, the respondents in the present case cannot be said to be directly injured by the existence of the Missouri welfare abortion statute but rather by conjectured future decisions by pregnant women. The court went on to hold that even if the plaintiffs in *Warth* met the injury in fact requirement, they could not qualify under the "zone of interests" test, because they asserted only the constitutional rights of low and moderate income persons not to be excluded from Penfield. Just so, the respondents in the present case are really asserting the rights of pregnant women to receive Medicaid assistance. The court found that there was no good reason to waive this second requirement in order to let the plaintiffs assert the constitutional rights of third persons because: Rochester taxpayers were not subject to Penfield's zoning ordinance (The respondents in this case are not subject to the Missouri statute providing Medicaid assistance on behalf of eligible needy persons.); and the third persons whose rights are at stake can assert their own rights in the proper case.

In amplification of the causal relationship discussed by the Court in *Warth,* 43 L.W. at 4911, if it is respondents' contention that they cannot treat X number of patients because of lack of public funds, any injury to their personal right to practice medicine is the result of their independent decision not to accept indigent patients who cannot afford their fees. If, on the other hand, they contend they will treat all indigent patients applying for abortion, how can the challenged statute interfere with their right to practice medicine in the grand manner?

Another plaintiff in *Warth,* a not-for-profit corporation whose purposes included the support of low and moderate income housing, claimed on behalf of a percentage of its membership, residing in Penfield, that the zoning ordinance of that community subjected them to a non-integrated "white ghetto" atmosphere. Again, the court found no standing:

> "Even if we assume *arguendo* that apart from any statutorily created right the asserted harm to Metro-Act's Penfield members is sufficiently direct and personal to satisfy the case or controversy requirement of Art. III, prudential considerations strongly counsel against according them to Metro-Act standing to prosecute this action. We do not understand Metro-Act to argue that Penfield residents themselves have been denied any constitutional rights, affording them a cause of action under 42 U.S.C. Section 1983. Instead, their complaint is that they have been harmed indirectly by the exclusion of others." *Warth* v. *Seldin,* 43 L.W. at 4913.

Likewise, the respondent-physicians in the present case are really asserting the constitutional rights of indigent pregnant women. Even if we assume that the respondents, in the absence of the challenged statute, might in the future receive public funds originally paid to a welfare recipient for an abortion operation, the only constitutional right which the respondents are asserting is the right of the woman to choose the abortion alternative to her pregnancy.

The remaining plaintiffs in *Warth* consisted of associations of developers, contractors, and other groups involved in the development of low and moderate cost housing. These plaintiffs alleged that various of their members were incurring economic detriment because Penfield's zoning restrictions had deprived them of business opportuni-

ties and profits. The court noted that the complaint of these plantiffs failed to specifically allege the existence of any specific project which a member contractor had been precluded from entering into, by reason of the zoning restrictions, nor any single instance when one of plaintiff's members had applied for or been denied a building permit or variance to build moderate or low cost housing. *Warth* v. *Seldin,* 43 L.W. at 4914. The respondents' complaint in this case suffers from the same fatal deficiency. The respondents have failed to allege a single specific instance where the operation of Section 208.152(12), has resulted in a detrimental effect to respondents, and, like the developer in *Warth,* only allege generalized loss of business profits due to the challenged statute.

In *Warth* v. *Seldin, supra,* the court emphasized the importance of standing in the following manner:

> "The rules of standing, whether as aspects of Art. III case or controversy requirement or as reflections of prudential considerations defining and limiting the role of the courts, are threshold determinants of the propriety of judicial intervention. It is the responsibility of the complainant clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute and the exercise of the court's remedial powers." *Warth* v. *Seldin,* 43 L.W. at 4914.

The Court has clearly indicated that suits should not be entertained by the federal courts unless the complainants are the appropriate parties to seek the relief requested. The docket of the Court cannot tolerate a succession of lawsuits brought, even if with the best of intentions, by persons attempting to assert the constitutional rights of third persons. It is clear in the present case that what the respondents are really seeking is legal recognition of

the fact that indigent pregnant women in Missouri should be eligible to receive Medicaid assistance for non-therapeutic abortions. These women are the proper parties, not the respondent-physicians. The respondents' interest is that they may be the ultimate recipient of public funds paid out in support of optional surgical processes. If the respondents can assert the unconstitutionality of a statute excluding optional abortion, it must follow that they have standing to assert that the State of Missouri must make Medicaid payments for other optional surgical processes such as plastic surgery or silicone transplants. This is patently not the case. Those who are eligible for Medicaid assistance are the proper individuals to assert that the state must make payment for a particular medical process. Doctors should not be allowed in court, in lieu of such eligible welfare recipients, to urge the expansion of Medicaid programs toward the economic betterment of the medical profession.

II

In reaching the merits of respondents' claim that the challenged state statute is unconstitutional, for the first time on appeal, the court below acted in excess of the authority conferred upon it by Congress by exercising original jurisdiction to reach an issue which is the proper subject for determination by a three-judge district court.

By way of introduction into its discussion of why the merits of respondents' claim should be reached, the United States Court of Appeals for the Eighth Circuit correctly noted the dangers of an appellate court deciding a claim not considered in the district court.

> "We are urged by appellants to reach the merits of this case rather than remand to the three-judge court. This question is not without its difficulty. There

is little direct authority for the propriety of our reaching the merits.'' (App. p. 70).

Nevertheless, the court below proceeded to decide, on the merits, the constitutionality of Section 208.152(12), RSMo Supp. 1973, for the first time on appeal. The Eighth Circuit acted in excess of its jurisdiction when it did so. The extent of the lower court's jurisdiction was to remand the matter to a three-judge district court for determination, on the merits, of the respondents' claim that the challenged state statute was unconstitutional.

When a three-judge panel of the United States District Court for the Eastern District of Missouri dismissed Count II of the respondents' complaint on the ground that physicians lacked standing to assert the unconstitutionality of Section 208.152(12), RSMo Supp. 1973, respondents appealed that order of dismissal to the United States Court of Appeals for the Eighth Circuit. On the record before the Court of Appeals, it was clear that the petitioner had never filed an answer to the respondents' complaint; that the record before the District Court in regard to the constitutionality of the challenged state statute consisted solely of conclusory statements included in respondents' complaint; that the District Court had never conducted a hearing or other inquiry into the constitutionality of the state statute on its face or as applied; that the District Court had made no ruling whatsoever involving the constitutionality of the state statute in question; that the petitioner had never had an opportunity to brief or argue the constitutional merits of Section 208.152; and that the respondents' complaint included every allegation necessarily prerequisite to the impaneling of a statutory three-judge district court. Regardless, the Court of Appeals, once it found that the respondents had sufficient standing, proceeded to determine that the challenged statute was unconstitutional relying

solely on the allegations in the respondents' Complaint and on the legal arguments included in the respondents' brief before the Eighth Circuit, which legal arguments were unresponsive to and irrelevant to the sole question on appeal, i.e., had the District Court erred in dismissing Count II of the complaint on the basis of standing.

As the court below properly noted, it had jurisdiction to entertain an appeal from a three-judge district court order dismissing a complaint for lack of standing pursuant to the decision of this Court in *Gonzalez* v. *Automatic Employees Credit Union*, ___ U.S. ___, 42 L.Ed.2d 249 (1974). (App. p. 67). During the period of time in which the respondents filed their notice of appeal to the Eighth Circuit and their appellate brief with that court, the proper appellate jurisdiction over a three-judge court order dismissing a complaint for lack of standing was with the Supreme Court. *Lynch* v. *Household Finance Corporation*, 405 U.S. 538, 541-542 n. 5 (1972); and *Flast* v. *Cohen*, 392 U.S. 83, 89-91 (1968). In fact, neither the Court of Appeals nor the attorneys for the various parties were aware of the existence of the *Gonzalez* case, or the charge it had made in appellate jurisdiction over three-judge district court orders not reaching the merits, at the time this matter was argued below. Neither the Eighth Circuit nor the respondent should be entitled to rely on the provident decision in *Gonzalez*, that the Court of Appeals had appellate jurisdiction to consider appeals from orders of three-judge district courts dismissing complaints for lack of standing, without, on the other hand, being bound by the clear enunciation, included in *Gonzalez*, concerning the parameters of the appellate jurisdiction of a Court of Appeals. In *Gonzalez*, this court reasoned that a three-judge court is not required in a case where the complaint is not justiciable in the federal courts. In other words, a single district judge has authority to dismiss a case for lack of standing and,

even if the dismissal on standing grounds is made by a three-judge court, such a court could have dissolved itself and left the order of dismissal up to a single judge. In such a case, proper appellate jurisdiction resides with the Circuit Courts of Appeal because no decision was rendered requiring a three-judge district court. *Gonzalez* v. *Automatic Employees Credit Union*, ____ U.S. ____, 42 L.Ed.2d 249, 258-159 (1974). Therefore, the only appellate jurisdiction which the Eighth Circuit had in this case was to review an order of dismissal, on the basis of standing, which order could have been made by a single judge. A single judge does not have the authority to render the relief on the merits required by respondents' complaint. Since the jurisdiction of the court below was based solely on the fact that a single judge could have dismissed Count II, it logically follows that a Court of Appeals does not have jurisdiction to review a decision, on the merits, required to be made by a three-judge district court. In that the Eighth Circuit could not have reviewed an opinion of the three-judge court on the merits, it is elementary that it cannot enter the case on the peripheral issue of standing and then proceed to resolve a constitutional question, required to be heard but which was not considered, by a district court of three judges.

Article III of the United States Constitution grants unto Congress the power to establish and prescribe the jurisdiction of the various federal courts. Congress has conferred exclusive original jurisdiction upon three-judge district courts in those cases where a state statute or administrative order is challenged, a state officer is named as a party defendant, injunctive relief is sought, and it is claimed that the state statute or administrative order is contrary to the United States Constitution. Title 28, U.S.C. Section 2281. Note that Congress has provided that in such case relief based on the unconstitutionality of a

state statute shall not be granted "unless the application therefor is heard and determined by a district court of three judges . . .". In the instant case, the United States District Court for the Eastern District of Missouri, impaneled as a three-judge court, has taken no action toward a determination of the constitutionality of Section 208.152 (12), RSMo Supp. 1973. Congress has also been explicit in its provision concerning the jurisdiction of the several Courts of Appeal. Title 28, U.S.C. Section 1291 provides:

> "The courts of appeal shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court."

Direct review of the decisions, on the merits, of three-judge district courts may be had in the Supreme Court. Title 28, U.S.C. Section 1253.

The conclusions to be drawn from congressional enactments concerning the jurisdiction of the several levels of federal courts are obvious (1) Complaints making the necessary allegations to invoke the operation of Section 2281 require a determination by a district court of three judges. Since Count II of the respondents' original complaint in this matter includes sufficient allegations to come within the three-judge district court statute, the merits were absolutely required to be heard by a district court of three judges in the exercise of its exclusive original jurisdiction (2) The courts of appeal have only appellate and no original jurisdiction. The constitutionality of Section 208.152, RSMo Supp. 1973, was not appealed to the Eighth Circuit because the issue had never been determined by the District Court. The Court of Appeals acted in excess of its authority when

it reached the merits of this case because it did not have the requisite jurisdiction to make such a determination (3) Having before it, on appeal, only the question of whether the respondents had standing to instigate their alleged cause of action, the extent of the authority of the Eighth Circuit was to reverse the District Court on the matter of standing and remand the case for further proceedings consistent with the three-judge court statutes. (4) Only the Supreme Court has jurisdiction to review, on the merits, a claim which must in the first instance be resolved by a district court of three judges. If the three-judge district court had ruled on the merits, the court below could not review that decision—only the Supreme Court could. Certainly, the Eighth Circuit cannot review the merits when the district court has not even considered them.

It is improper for a Court of Appeals to consider constitutional questions for the first time on appeal whether or not the controversy, in the first instance, was one for resolution by a one-judge or a three-judge district court. It is well recognized that a Court of Appeals should not reach on appeal the merits of an issue in regard to which a District Court has not ruled. *Equal Opportunity Commission* v. *Standard Forage and Axel Co., Inc.*, 496 F.2d 1392 (5th Cir. 1974); *Eureka-Carlisle Co.* v. *Rottman*, 398 F.2d 1015, 1019 (10th Cir. 1968); and *Fitts* v. *U.S.*, 376 F.2d 516 (10th Cir. 1967). It is even more fundamental the constitutional question should not be considered for the first time on appeal. *Giordano* v. *United States*, 394 U.S. 310, 312-313 (1969); *Bandy* v. *U.S.*, 396 F.2d 929, 930, *cert. den.* 393 U.S. 1004 (1968); *Gardner* v. *Meyers*, 491 F.2d 1184, 1190 (8th Cir. 1974).

The court below intimated that it had original jurisdiction, once a case was properly before it, "to do what plainly ought to done." *Mercury Motor Express, Inc.* v. *Brinke*, 475 F.2d 1086, 1091 (5th Cir. 1973). The quote in the *Mercury Motor Express* case is borrowed out of context. In that case, a one-judge district court denied preliminary injunctive relief to the appellant. That denial was appealed to the Fifth Circuit. The District Court had also stayed further proceedings pending action by a federal administrative agency. Although the stay itself was not an appealable order, the Fifth Circuit found that on interlocutory appeal from an order denying preliminary injunctive relief it could inquire into the wisdom of the stay order. This is a much different matter than reaching the merits of a state statute's constitutionality on appeal from an order from a three-judge district court dismissing a case on the basis of standing. Also, in the *Mercury Motor Express* case, the district court had taken action to issue a stay order, but the issuance of the stay order, unlike the denial of preliminary injunctive relief, was not an appealable order. In the present case, the three-judge district court has taken no action whatsoever to reach the merits of the respondents' constitutional claim.

The Eighth Circuit also attempted to justify reaching the merits in this matter on the basis that the constitutional claim presented was so clear that further proceedings in the district court were unnecessary. In support of this proposition, that court cited *Board of Managers of Ark. Tr. Sch. for Boys* v. *George*, 377 F.2d 228 (8th Cir. 1967); *Levin* v. *Mississippi River Fuel Corp.*, 386 U.S. 162 (1967); and *Bailey* v. *Patterson*, 369 U.S. 31 (1962). A one-judge district court was involved in the first two of those cases. In *Board of Managers of Ark., Tr. Sch. for Boys* v. *George, supra*, the defendant Board responsible for Arkansas' training schools for juvenile boys filed an interlocutory appeal to the Eighth Circuit from an order overruling their motion to dismiss. The statutes establishing the state training schools in Arkansas provided for

separate facilities for white and black juveniles. The Eighth Circuit affirmed the denial of the motion to dismiss and remanded the case with directions that the state statutes were clearly unconstitutional because comprehensive and authoritative decisions of the Supreme Court prohibited segregation in state institutons. *Id.* at 231. In fact, *Brown* v. *Board of Education of Topeka,* 347 U.S. 483 (1954), concerning equal educational facilities and one of the most famous landmark cases in Supreme Court history, had been decided thirteen (13) years before the Arkansas case was heard. On the other hand, it is not a settled matter of constitutional law that a state must provide Medicaid assistance for non-therapeutic abortions. The Supreme Court has never considered that issue.

In *Levin* v. *Mississippi River Fuel Corporation, supra,* at 839-840, this Court determined that it could reach the incidental issue of whether "company action" was involved in a stock exchange plan thereby making state law applicable to shareholder voting on a voluntary railroad company consolidation. It was unclear whether the court of appeals had reached that issue. Nevertheless, the court of appeals had determined that state law did not apply, unlike the present case in which the district court has never considered the merits at all. Moreover, this Court, in *Levin* very clearly refrained from reaching the merits of the proposed stock exchange plan itself. The Court only considered those issues relevant to the applicability of state statute, as opposed to federal law, a matter which the court of appeals had considered reaching a contrary result to that reached by the Supreme Court.

Bailey v. *Patterson, supra,* cited by the Eighth Circuit from a footnote in *Gonzalez* v. *Automatic Employees Credit Union,* ____ U.S. ____, 42 L.Ed.2d 249 (1974), comes the closest of any case cited by the Court of Appeals to stand-

ing for the proposition that a wholly insubstantial constitutional claim may be considered on appeal from a dismissal on procedural grounds. A three-judge district court had abstained from further proceedings on a complaint alleging that a Mississippi state statute denied Negroes their constitutional right to non-segregated transportation service in interstate transportation. The Court held that any claim that a state statute, which on its face provided for segregation of transportation facilities in interstate commerce, was constitutional would be frivolous. The Court vacated the abstention order of the three-judge district court and remanded the matter for expeditious disposition in light of the court's position that any statute providing for unsegregated transportation service was unconstitutional. Again, and as will be discussed below, it is not clear from Supreme Court case law, there being no decisions of the Court on that topic, that a state statute excluding non-therapeutic abortions from eligibility from Medicaid is unconstitutional.

In each of the three cases discussed above, the reviewing court remanded the case for further proceedings in light of its pronouncements on a particular issue. In the present case, the Eighth Circuit reversed the district court outright, without remand, on an issue which the district court had never considered. The exception to the general rule that an appellate court should not consider constitutional questions for the first time on appeal, i.e., that the constitutional question concerned is wholly insubstantial, does not apply to the present case. There is no support whatsoever in the decisions of this court that a state cannot finance necessary medical procedures unless it also agrees to finance procedures which are purely optional. *Roe* v. *Wade,* 410 U.S. 113 (1973), and *Doe* v. *Bolton,* 410 U.S. 179 (1973) go no further than holding that voluntary abortion may not be made the subject of criminal

sanctions when timely performed. It is quite another thing to say that the state must give financial assistance for an abortion simply because an indigent chooses to have one. The Equal Protection Clause prohibits only invidious discrimination. As the recent decisions of this Court in Equal Protection matters attests, the clause does not enjoin differential treatment based on a reasonable classification in support of valid policy.[1] The opinion by the Court of

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[1] A state may provide that local schools are to be financed substantially by local property taxes in spite of the wide variation of the taxing resources of the several districts. *San Antonio Independent School District* v. *Rodriguez*, 411 U.S. 1 (1973).

A state may permit in-term salary increases for judges of some courts which are denied to other judges. *Ohio Municipal Judges Association* v. *Davis*, 411 U.S. 144 (1973).

Windows may be afforded tax exemptions which are not available to widowers. *Kahn* v. *Shevlin*, 416 U.S. 351, 40 L.Ed.1d 189, 94 S.Ct. 1734 (1974).

A state may exclude disabilities due to normal pregnancy in a disability insurance program while covering other disabilities of comparable duration including disability through abnormal pregnancy conditions. *Geduldig* v. *Aiello*, 417 U.S. 484, 41 L.Ed.1d 256, 94 S.Ct. 2485 (1974).

A state may furnish textbooks or transportation to public school pupils without providing equivalent services for those who attend non-public schools, in spite of constitutional permission for such aid. *Bruska* v. *Missouri*, 332 F.Supp. 275 (E.D.Mo. 1971); aff'd 405 U.S. 1050 (1972).

The federal government is not required to provide veterans' benefits to conscientious objectors who elect alternate service. *Johnson* v. *Robison*, 415 U.S. 361, 39 L.Ed.2d 389, 94 S.Ct. 1160 (1974).

Appeals does not logically follow the decisions of this court in *Roe, supra,* and *Doe, supra.* It is a much different thing to say that a doctor cannot be legally prosecuted for performing an abortion requested by a pregnant woman than to say, as the Court of Appeals has done, that states must subsidize the abortion process with public funds.

Likewise, the decision by the Court of Appeals, in conjunction with the provisions of Title XIX of the Social Security Act, and the Rules and Regulations promulgated thereunder, constitutes an unconstitutional intrusion by the federal courts and Congress into the internal affairs of the State of Missouri, which intrusion should not be tolerated in a federal system of government with powers and rights reserved to the states by the Tenth Amendment to the United States Constitution. The effect, *in toto,* of the Court of Appeals' opinion in the statutes discussed above is to force the State of Missouri to publicly fund non-therapeutic abortions, against the public policy of the state as announced by its Legislature, because refusal to do so would forfet all federal Medicaid grants.[2]

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[2] Petitioner Singleton has been administering the Division of Family Services of the Missouri Deartment of Social Services, in accordance with Title XIX of the Social Security Act, the Rules and Regulations promulgated thereunder, and instructions passed on by federal administrators, on the premise that should the state plan fail to provide for prenatal services for eligible individuals choosing to carry a pregnancy to term, or if the state refuses to pay for such services contrary to a state plan, that the State of Missouri would cease to be eligible for federal Medicaid grants. Using the present fiscal year as a basis, this would cost the State of Missouri approximately sixty-six (66) million dollars a year. The decision of the Court of Appeals, that should the state reimburse normal pregnancy it is

In deciding whether to reach the merits of a constitutional claim that a state statute excluding non-therapeutic abortions from state Medicaid benefits was invalid, the United States Court of Appeals for the Sixth Circuit reached the opposite result of the court below. After determining that an Ohio statute, similar to the Missouri statute here in question, restricting the payment of Medicaid funds to those abortions necessary to preserve the mental or physical health of the pregnant woman, was not in conflict with the pertinent federal statutory provisions of the Social Security Act, the Sixth Circuit determined that it was without jurisdiction to reach the constitutionality of that Ohio statute absent a finding on the issue by a three-judge district court.

> "We are unable to agree that this case falls within the exception to the application of Section 2281 which has been carved out by the courts in situations in which the constitutional issue has been clearly settled or resolved. This exception to the three-judge court requirement was expressed in *Board of Supervisors of La. St. U. & A. & M. College* v. *Ludley*, 252 F.2d 372, 376 (5th Cir. 1958), *cert. denied*, 358 U.S. 819; 79 S.Ct. 31, 3 L.Ed.2d 61 (1958):
>
> > There can be no real dispute where each separate element on which the state relies to support the constitutionality of a statute has been clearly put to rest by the Supreme Court contrary to the contention of the state. *Cf. Goosby* v. *Osser*, 405 U.S. 512, 518, (93 S.Ct. 854, 35 L.Ed.2d 36 (1973).
>
> Although there have been a number of lower court

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required to reimburse non-therapeutic abortions, places the state in a position where it must pay for non-therapeutic abortions or loose federal Medicaid funds.

> decisions holding state statutes similar to the Ohio law are unconstitutional, it cannot be said that the issue has been put to rest by the Supreme Court. In *Roe* v. *Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), and *Doe* v. *Bolton*, 410 U.S. 179, 93 S.Ct. 739, 35 L.Ed.2d 201 (1973), the Supreme Court condemned state action infringing the right to have an abortion. In those cases the Supreme Court did not consider the question of payment of expenses for abortion whether non-therapeutic or otherwise. We find ourselves, therefore, in disagreement with the Eighth Circuit's ruling in *Wulff* v. *Singleton*, 508 F.2d 1211 (8th Cir. 1974), that the unconstitutionality of this type of statute is so 'obvious and patent' as to obviate the need for a three-judge court."

Roe v. *Ferguson*, 515 F.2d 279, 284 (6th Cir. 1975).

We are in complete agreement with the analysis of the Sixth Circuit. The court below, after it found that the respondents have standing, should have remanded the matter to the three-judge district court for further proceedings on the merits of respondents' constitutional claim.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the court below finding that respondents had standing to adjudicate the unconstitutionality of Section 208.152(12), RSMo Supp. 1973, should be reversed. If this court should affirm the decision of the court below that respondents have standing, then this matter should be remanded with instructions that a three-judge district court proceed to the merits of respondents' constitutional claim.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-1393

THOMAS E. SINGLETON, Chief of Bureau of Medical Services, Division of Welfare, State Department of Public Health and Welfare,
Petitioner,

vs.

GEORGE J. L. WULFF, JR., M.D., and MICHAEL FREIMAN, M.D.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR RESPONDENTS

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-1393

THOMAS E. SINGLETON, Chief of Bureau of Medical Services, Division of Welfare, State Department of Public Health and Welfare,
Petitioner,

vs.

GEORGE J. L. WULFF, JR., M.D., and MICHAEL FREIMAN, M.D.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR RESPONDENTS

THE QUESTIONS PRESENTED FOR REVIEW

I. Whether there is a logical nexus between the status of respondent-physicians and the claims they seek to have adjudicated sufficient to confer standing on them to challenge the constitutionality of Section 208.152, Missouri Revised Statutes (Supp. 1973)?

II. Whether the Court of Appeals acted in excess of its jurisdiction when it proceeded to determine on the merits the constitutionality of Section 208.152, Missouri Revised Statutes (Supp. 1973)?

STATEMENT OF THE CASE

On November 2, 1973 respondent-physicians filed a three-count *Complaint for Declaratory Judgments and Injunctive Relief* (Apx. pp. 9-20) seeking declarations of certain constitutional rights intrinsically involved in the physician-patient relationship, ***per se***, and such rights as they affect both the class of physicians and the class of women patients, each independently.

Count I (Apx. pp. 9-14) and Count III (Apx. pp. 17-20) were directed against The State Board of Registration for the Healing Arts. The dismissals of the same on May 13, 1974, by the District Court on the basis of "lack of controversy" (Apx. pp. 46 and 53) were not appealed. This decision to forego appeal as to Counts I and III was made by respondents and their counsel in the belief that the issues raised in Counts I and III were more sharply presented and directly confronted in a case entitled *Planned Parenthood of Central Missouri*, et al. v. *Danforth*, etc., et al., filed on June 17, 1974 in the same District Court as the present cause, and now pending on cross-appeals before this Honorable Court.[1]

In reaction to this Honorable Court's historic decisions in *Roe*, et al. v. *Wade*, etc., 410 U.S. 113 (1973) and its companion case of *Doe*, et al. v. *Bolton*, etc., et al., 410 U.S. 179

[1] Reported below at 392 F. Supp. 1362 (E.D.Mo. 1975), *stayed and enjoined*, 420 U.S. 918 (1975). The cross-appeals have been designated in this Honorable Court as Nos. 74-1151 and 74-1419. Respondent Freiman herein is an appellant and appellee in said cross-appeals, respectively.

(1973), the State of Missouri and its principal metropolitan area, the City of St. Louis, enacted various legislative and regulatory schemes designed to thwart and to circumvent the full impact of *Roe, supra*, and *Doe, supra*. The legislation challenged in Count II (Apx. pp. 14-17) was approved on July 16, 1973 and became effective on September 28, 1973.

Missouri Revised Statutes, Title 12, Chapter 208, Section 208.152 provides in pertinent part for "(b)enefit payments for medical assistance . . . on behalf of those eligible needy persons" for "(f)amily planning services", but "shall not include abortions unless such abortions are medically indicated".

In the District Court proceedings petitioner stated under oath, dated January 15, 1974, in response to respondents' interrogatories nos. 1 and 2 (Apx. pp. 22-23) that,

> *"Answer to Interrogatory No. One*
>
> . . . For the months of September (after the 28th), October, November and December, 1973 no such payments were made."
>
> *"Answer to Interrogatory No. Two*
>
> 2. No definition or interpretation has been established for the phrase 'abortions medically indicated' and no determination has been made as to what medical symptoms, diagnoses, indications or justifications would qualify an abortion to be 'medically indicated'." (Apx. pp. 26-27).

In fact, not a single medical assistance payment was made for an abortion, although hundreds of applications had been submitted to petitioner, until subsequent to the Appellate Court ruling on December 31, 1974, reported at 508 F.2d 1211 (8th Cir. 1974). (Apx. pp. 65-73).

Respondents, each by separate affidavit dated February 18, 1974 and filed February 19, 1974 in the District Court, respectively verified and stated, in part,

"8. He is uncertain of the present interpretation applied by defendant Thomas E. Singleton, Chief of Bureau of Medical Services, Division of Welfare, State Department of Public Health and Welfare, or others under said defendant's supervision to the term 'abortions medically indicated'; what criteria are included and excluded under said definition; and, what medical symptoms, diagnosis, indications or justifications would qualify an abortion to be 'medically indicated' under § 208.152 R.S.Mo. 1969, as codified and as applied by said defendant and/or others under his supervision. By virtue of said plaintiff's uncertainty in respect to § 208.152 R.S.Mo. 1969, he is deterred from the practice of medicine in the manner he considers to be most expertise and beneficial for his welfare patients eligible for Medicaid payments and in the manner he considers to be in the highest standard of medical practice and said uncertainty chills and thwarts the ordinary and customary functioning of the doctor-patient relationship between this plaintiff and his welfare patients eligible for Medicaid payments."

"9. He has provided, and anticipates providing abortions to welfare patients who are eligible for Medicaid payments but he and said patients have been refused, and anticipate future refusals by defendant Singleton and/or those under his supervision to make Medicaid payments for abortions based upon the challenged language in § 208.152 R.S.Mo. 1969. Said refusals by said defendant, and anticipated future refusals of a like nature deter this plaintiff from the practice of medicine in the manner he considers to be most expertise and beneficial for said patients and in the manner he considers to be in the highest standard of medical practice and said refusals chill and thwart the ordinary and customary functioning of the doctor-patient relationship between this plaintiff and said patients." (Apx. pp. 31-32, 35-36).

On February 22, 1974 and in regard to Count II, petitioner duly filed his "Motion for Extension of Time and Suggestions in Support Thereof" and requested "an additional thirty days from February 25, 1974 through March 27, 1974" by reason,

> "(2) That plaintiffs have filed affidavits in connection with their Memorandum in Opposition to defendant Singleton's motion to dismiss and unless this court excludes such affidavits from its consideration, by Rule 12 (b)(6), Federal Rules of Civil Procedure, defendant should be granted a reasonable opportunity to present material in opposition to the material presented in the affidavits of plaintiffs. Such an extension may be granted pursuant to this court's Rule VIII(c)(4)" (*sic*, VII(c)(4) in the original).
>
> "(3) That Assistant Attorney General, Kermit W. Almstedt, contacted by telephone his client on the date of receipt of plaintiffs' Memorandum in Opposition to defendant Singleton's motion to dismiss and was informed that it would take approximately thirty days to compile the necessary data and information in order to contravene any allegations of fact raised in plaintiffs' affidavits."
>
> "(4) That the request for extension of thirty days is not made for any dilatory reason and should be an appropriate amount of time for defendant Singleton, through his attorney of record, Kermit W. Almstedt, Assistant Attorney General, State of Missouri, to file all necessary material in opposition to plaintiffs' affidavits filed in support of plaintiffs' Memorandum in Opposition to defendant Singleton's Motion to Dismiss." (Apx. p. 38).

Petitioner failed to file any such opposing materials or affidavits, either prior or subsequent to March 27, 1974.

Count II was dismissed by the District Court on May 31, 1974 "for lack of standing". (Apx. p. 53). Respondents duly filed their Notice of Appeal on June 28, 1974. (Apx. p. 63).

This cause was reversed on the merits by the United States Court of Appeals for the Eighth Circuit on December 31, 1974 and that opinion is reported at 508 F.2d 1211 (8th Cir. 1974). (Apx. pp. 65-73).

Respondents filed on January 2, 1975 a motion for rehearing seeking clarification of the Appellate Court's opinion and an award of counsel fees. (Apx. pp. 74-80). The Appellate Court, in a brief *per curiam* order filed January 9, 1975, clarified its prior and recent decision by limiting its scope to the precise issue raised by respondents. 508 F.2d at p. 1216. (Apx. pp. 81-82). Petitioner's "Motion for Stay of Mandate" (Apx. pp. 83-86) was filed on January 20, 1975 and denied by the Appellate Court on January 31, 1975. (Apx. p. 87).

Petitioner sought an extension of time during which to file his petition for writ of certiorari and the same was granted by the Honorable Harry A. Blackmun, Associate Justice, on March 26, 1975. (Apx. p. 88). Petitioner's petition for writ of certiorari was duly filed on May 6, 1975 and granted in limited fashion on June 23, 1975. 95 S.Ct. 2655, 45 L.Ed.2d 692 (1975). (Apx. pp. 89-90).

SUMMARY OF ARGUMENT

I

Respondents have adequate standing in their own right, independent of their patients, by reason of a basic right to freely practice medicine (*Rosen* v. *The Louisiana State Board of Medical Examiners*, 380 F.Supp. 875 [E.D. La. 1974], *affirmed*, 419 U.S. 1098 [1975]) and by reason of their economic interest (*Association of Data Processing Service Organizations, Inc.*, et al. v. *Camp*, etc., et al., 397 U.S. 150 [1970]). Physicians also demonstrate the necessary "logical nexus" (*Flast*, et al. v. *Cohen*, etc., et al., 392 U.S. 83 [1968]).

Respondents have standing, in addition, through the defense of their patients' basic fundamental rights. The right to terminate a pregnancy is a joint right of patient and physician (*Roe*, et al. v. *Wade*, etc., 410 U.S. 113 [1973]). There exists a pragmatic need for physicians to bear the brunt of litigation on behalf of their indigent patients and this surrogate standing has been allowed in an identical situation (*Roe*, et al. v. *Ferguson*, et al., 515 F.2d 279 [6th Cir. 1975]), in similar medicaid situations (*Seneca Nursing Home*, et al. v. *The Kansas State Board of Social Welfare*, et al., 490 F.2d 1324 [10th Cir. 1974], *cert. denied*, 419 U.S. 841 [1974]), and in analogous situations (*Bantam Books, Inc.*, et al. v. *Sullivan*, et al., 372 U.S. 58 [1963]).

Lastly, the factual circumstances herein are well within the recognized parameters of exceptions permitting constitutional *jus tertii* and standing may be sustained by the statutory overbreadth infringement of the patients' fundamental rights (*Bigelow* v. *Commonwealth of Virginia*, 95 S.Ct. 2222, 44 L.Ed.2d 600 [1975]).

II

The Appellate Court properly adjudicated the merits of the cause before it in a manner consistent with proper judicial economy and administration (*Hormel* v. *Helvering*, etc., 312 U.S. 552 [1941]). The matter before it was ripe for adjudication (*Levin* v. *Mississippi River Fuel Corp.*, et al., 386 U.S. 162 [1967]) and to have done otherwise would have created a manifest injustice contrary to established practice and logic (*Hurwitz*, et al. v. *Directors Guild of America, Incorporated*, 364 F.2d 67 [2nd Cir. 1966], *cert. denied*, 385 U.S. 971 [1966]). The issue at hand had been previously and firmly decided in like manner. Three judges, pursuant to 28 U.S.C. 2281, were neither required nor indicated (*Gonzalez* v. *Automatic Employees Credit Union*, et al., 419 U.S. 90 [1974]).

The issues had been fully and properly raised below and, in fact, petitioner had chosen to waive his right to contest them.

ARGUMENT

I

A Sufficient Logical Nexus Exists Between the Status of Respondent-Physicians and the Claims They Seek to Have Adjudicated, So as to Confer Standing Upon Them to Challenge the Constitutionality of Section 208.152, Missouri Revised Statutes, (Supp. 1973).

A. **Introduction.**

Although this Honorable Court limited the issue of standing on certiorari to the question of "logical nexus" (Apx. p. 89), petitioner has expanded this issue to include the question of "zone of interest" within his *Brief*. (Ptn. Br. p. 2, *et seq.*). Respondents, accordingly shall discuss both facets of standing.

B. **The adequate standing of respondent-physicians in their own right, independent of the rights of their pregnant, indigent patients.**

1. *The Right to Freely Practice Medicine: "The statute interferes with the appellants' (respondents) practice of medicine . . . professionally . . .". Wulff, supra,* 508 F.2d at p. 1214. (Apx. p. 69).

The Eighth Circuit has previously noted in a case brought by physicians against a public hospital's refusal to allow abortions,

> "We think that the Supreme Court in Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973) and Doe v. Bolton, 410 U.S. 179, 93 S.Ct. 739, 35 L.Ed.2d 201 (1973) has clearly paved the way for physicians to assert their constitutional rights to practice medicine, which now includes the right to advise and perform abortions.

Justice Blackmun writing for the Court in Roe v. Wade, *supra* at 163, of 410 U.S. at 732 of 93 S.Ct. stated:

> (F)or the period of pregnancy prior to this 'compelling' point, the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that, in his medical judgment, the patient's pregnancy should be terminated. If that decision is reached, the judgment may be effectuated by an abortion free of interference by the State."
>
> . . .
>
> "The impact of the court's discussion cannot be fairly said to limit standing to sue in abortion cases to pregnant women. Neither can these opinions be read so narrowly as to accord standing only to a physician threatened with criminal prosecution. *See* Doe v. Bolton, *supra*, at 188-189 of 410 U.S., 93 S.Ct. 739. Clearly the claims of medical doctors to 'freely practice medicine according to the highest medical standards without arbitrary outside restraints' are inextricably bound up with the privacy rights of women who seek abortions. YWCA v. Kugler, 342 F. Supp. 1048, 1055 (D.N.J. 1972). This is sufficient to present a justiciable controversy and confer standing on the physicians who bring this action. *See* Griswold v. Connecticut, 381 U.S. 479, 481, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965); Abele v. Markle, 452 F.2d 1121, 1125 (CA2 1971); stay granted, 409 U.S. 908, 93 S.Ct. 212, 34 L.Ed.2d 169 (1972), remanded for consideration in light of Roe and Doe, 410 U.S. 951, 93 S.Ct. 1417, 35 L.Ed.2d 683 (1973); Doe v. Turner, 361 F.Supp. 1288, 1289 (D.Iowa 1973) (3 judge court); Freeman & Bass, P.A. v. State of N.J. Com'n of Invest., 359 F.Supp. 1053, 1059 (D.N.J. 1973); *cf.* O'Shea v. Littleton, 414 U.S. 488, 94 S.Ct. 669, 38 L.Ed.2d 674 (1974)." *Nyberg*, et al. v. *The City of Virginia*, et al., 495 F.2d 1342, 1344 (8th Cir. 1974).[2]

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[2] *Cert. denied*, 419 U.S. 891 (1974).

Similarly, it is an aspect of the physician's general liberty under the Fourteenth Amendment to practice his chosen profession free from unconstitutional restraint.[3] The right to practice medicine has consistently been protected by the federal courts. In *United States v. Freund*, 290 Fed. 411 (D.Mont. 1923), the court invalidated a Prohibition Act which restricted the amount of alcohol a physician could prescribe,

> "It is an extravagant and unreasonable attempt to subordinate the judgment of the attending physician to that of Congress, in respect to matters with which the former alone is competent to deal, and infringes upon the duty of the physician to prescribe in accord with his honest judgment, and upon the right of the patient to receive the benefit of the judgment of the physician of his choice." 290 Fed. at p. 414.[4]

With respect to the prescription of contraceptives, moreover, physicians received considerable protection in many early cases to the point that the various Comstock acts lapsed into desuetude.[5]

Even more compelling is this Honorable Court's treatment of this very issue in the historic cases of *Roe*, et al. v. *Wade*, etc., 410 U.S. 113 (1973), and *Doe*, et al. v. *Bolton*, etc., et al., 410 U.S. 179 (1973), wherein the latter it was stated,

> "(T)he physician-appellants, who are Georgia-licensed doctors consulted by pregnant women, also present a

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[3] See, *Rosen* v. *The Louisiana State Board of Medical Examiners*, 380 F.Supp. 875 (E.D.La. 1974), *affirmed*, 419 U.S. 1098 (1975).

[4] Cited with approval by dissenting Judge Green in *Steinberg*, et al. v. *Brown*, etc., et al., 321 F.Supp. 741, 758 (N.D.Ohio 1970).

[5] See, *e.g.*: *United States* v. *Nicholas*, 97 F.2d 510 (2d Cir. 1938) (L.Hand,J.); *United States* v. *One Package*, 86 F.2d 737 (2d Cir. 1936) (A. Hand, J.); *Davis*, et al. v. *United States*, 62 F.2d 473 (6th Cir. 1933); *Youngs Rubber Corporation, Inc.* v. *C. I. Lee & Co., Inc.*, et al., 45 F.2d 103 (2d Cir. 1930) (Swan, J.); and *Bours v. United States*, 229 Fed. 960 (7th Cir. 1915).

> justiciable controversy and do have standing despite the fact that the record does not disclose that any one of them has been prosecuted, or threatened with prosecution, for violation of the State's abortion statutes." 410 U.S. at p. 188.

The principle of physicians' standing in abortion regulation cases has not been limited by the federal courts merely to those statutes invoking criminal sanctions for noncompliance. The same principle has been applied equally to cases such as here, where the non-criminal regulation interferes with the protected physician-patient relationship and unconstitutionally inhibits the free election and/or effectuation of an abortion.[6]

Respondents maintain that their standing is ample and sufficient in this cause. Respondents' claim is primarily based upon the interference here by the state in the constitutionally protected area of the decision regarding abortion between a patient and her physician. The procedure of abortion cannot be viewed in the same light as other medical and surgical procedures. It alone has been afforded constitutional guarantees.

Although petitioner has chosen to ignore these cases dealing with analogous acts by state governments to discourage and to prevent the full exercise of abortion-related rights, they are relevant, persuasive and unanimous. Petitioner does not cite a single case holding that physicians, in either a criminal

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[6] See, *e.g.*: *Doe*, et al. v. *Bellin Memorial Hospital*, et al., 479 F. 2d 756 (7th Cir. 1973); *Nyberg*, et al. v. *The City of Virginia*, et al., 495 F.2d 1342 (8th Cir. 1974), *cert. denied*, 419 U.S. 891 [1974]; *Orr*, et al. v. *Koefoot*, et al., 377 F.Supp. 673 (D.Neb. 1974); *Roe*, et al. v. *Ferguson*, et al., 389 F.Supp. 387 (S.D.Ohio 1974), *remanded for determination of constitutional grounds*, 515 F.2d 279 (6th Cir. 1975); and *Hallmark Clinic*, et al. v. *North Carolina Department of Human Resources*, et al., 380 F.Supp. 1153 (E.D.N.C. 1974).

or a non-criminal, abortion-related matter, did not possess the requisite standing.[7]

2. *Economic Interests: "The statute interferes with the appellants' (respondents) practice of medicine . . . monetarily."* (*Wulff, supra,* 508 F.2d at p. 1214). (Apx. p. 69).

As the Eighth Circuit readily discerned in *Nyberg, supra* at fn. 6,

> "Furthermore, the practical effect of the stringent limitation . . . for performing abortions is to arbitrarily bar the physicians from activities that directly affect their economic interests." 495 F.2d at p. 1344.

The financial effect upon respondents under the challenged Medicaid payment statute is certainly more direct and immediate than the situation in *Nyberg, supra,* which dealt with the particular medical facility in which abortions could be performed.

As simply stated by the Appellate Court below,

> "We think that there is no question that (1) appellants allege that the challenged acts have caused them 'injury in fact, economic or otherwise' and (2) 'the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.' Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150, 152-153, 90 S.Ct. 827, 829-830, 25 L.Ed. 2d 184 (1970). To hold otherwise in light of the authority cited above would defy logic. These medical doctors have standing to pursue this action." 508 F.2d at p. 1214. (Apx. pp. 69-70).

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[7] For a similar holding on physician standing in the related field of contraception, see the recent decision in *Population Services International,* et al. v. *Wilson,* et al., — F.Supp. — (S.D.N.Y. 1975).

This type of a financial "standing" interest has been held sufficient, time and time again, by this Honorable Court.[8]

> "The question of standing is different. It concerns, apart from the 'case' or 'controversy' test, the question whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question. . . . That interest, at times, may reflect 'aesthetic, conservational, and recreational' as well as economic values. *Scenic Hudson Preservation Conf.* v. *FPC,* 354 F.2d 608, 616; *Office of Communication of United Church of Christ* v. *FCC,* 123 US App. D.C. 328, 334-340, 359 F.2d 994, 1000-1006. A person or a family may have a spiritual stake in First Amendment values sufficient to give standing to raise issues concerning the Establishment Clause and the Free Exercise Clause. *Abington School District* v. *Schempp,* 374 U.S. 203. We mention these non-economic values to emphasize that standing may stem from them as well as from the economic injury on which petitioners rely here. Certainly he who is 'likely to be financially' injured, *FCC v. Sanders Bros. Radio Station,* 309 U.S. 470, 477, may be a reliable private attorney general to litigate the issues of the public interest in the present case."
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> "Where statutes are concerned, the trend is toward enlargement of the class of people who may protest administrative action. The whole drive for enlarging the category of aggrieved 'persons' is symptomatic of that trend. In a closely analogous case we held that an existing entrepreneur had standing to challenge the legality of the entrance of a

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[8] See, *e.g.*: *Association of Data Processing Service Organizations, Inc.,* et al. v. *Camp,* etc., et al., 397 U.S. 150, 151-156 (1970); *Arnold Tours, Inc.,* et al. v. *Camp,* et al., 400 U.S. 45, 46 (1970); and *Investment Company Institute,* et al. v. *Camp,* etc., et al., 401 U.S. 617, 620-621 (1971).

newcomer into the business, because the established business was allegedly protected by a valid city ordinance that protected it from unlawful competition. *Chicago v. Atchison, T. & S. F. R. Co.*, 357 U.S. 77, 83-84." *Association of Data Processing*, etc., et al., *supra* at fn. 8, 397 U.S. at pp. 153-154.

Fifty years ago, this Honorable Court held that the economic loss to befall private schools, by a law requiring all children to attend only public schools, was ample grounds for standing. *Pierce*, etc., et al. v. *Society of Sisters*, 268 U.S. 510, 535-536 (1925).

Respondents' injury is clear and actual, as evidenced by their affidavits (Apx. pp. 29-36) and the Appellate Court's finding below of allegations that "the challenged acts have caused them 'injury in fact, economic or otherwise'." 508 F.2d at p. 1214. (Apx. pp. 69-70). Respondents' injury far exceeds the enunciated standard of being "arguably within the zone." *Association of Data Processing*, etc., et al., *supra* at fn. 8, 397 U.S. at p. 153.

Regardless of actual injury, this Honorable Court has held that potential injury is sufficient for standing.[9]

As stated by one commentator,

> "If plaintiff did not have the minimal personal involvement and adversement which Article III requires, he would not be engaging in the costly pursuit of litigation."[10]

As noted recently by the Eighth Circuit, the concept of standing remains in many ways as described 24 years ago.

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[9] See, *Warth*, etc., et al. v. *Seldin*, et al., 95 S. Ct. 2197, 2205, 45 L.Ed.2d 343, 354-355 (1975); and *Association of Data Processing*, etc., et al., *supra* at fn. 8, 397 U.S. at p. 154.

[10] Scott, *Standing in the Supreme Court—A Functional Analysis*, 86 HARV. L. REV. 645, 674 (1973).

> "Standing doctrine was described in 1953 as 'a complicated speciality of federal jurisdiction, the solution of whose problem is . . . more or less determined by the specific circumstances of individual situations . . .' United States v. Federal Power Commission, 345 U.S. 153, 156, 73 S. Ct. 609, 612, 97 L.Ed. 918 (1953) (Frankfurter, J.). Since 1953 the doctrine has evolved considerably. Whether that evolution be toward greater complexity or simplicity is disputed by commentators."[11]

One commentator suggests that the concept of injury in fact to sustain standing 'has been so diluted that even the most trivial interest will suffice."[12] A recent Ninth Circuit case allowed standing to an individual exposed to breathing "air less pure than that mandated by the Clear Air Act."[13] Respondents possess the elements of standing far in excess of whatever the minimum parameters may be.

3. *A Logical Nexus.*

Respondents, as so found by the Appellate Court below, clearly meet the standard prescribed by *Flast*, et al. v. *Cohen*, etc., et al., 392 U.S. 83, 102 (1968), that there exists "a logical nexus between the status asserted and the claim sought to be adjudicated." Assuming, *arguendo*, the fact that hypothetical

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[11] *Coalition for the Environment*, et al. v. *Volpe*, et al., 504 F.2d 156, 164 (8th Cir. 1974).

[12] Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1382 (1973).

[13] *Natural Resources Defense Council, Inc.*, et al. v. *United States Environmental Protection Agency*, 507 F.2d 905, 910 (9th Cir. 1974). See, also, *West Coast Construction Company, Inc.* v. *Oceano Sanitary District*, et al., 311 F.Supp. 378, 380-382 (N.D.Cal. 1970), in which plaintiff held to have standing to challenge governmental body's use of federal funds in defending plaintiff's state court action against it.

plaintiffs may exist, who have standing in this cause and even a greater "logical nexus," does not preclude respondent-physicians from maintaining their own and distinct requisite standing.

This Honorable Court in *Flast, supra,* stated,

> "The various rules of standing applied by federal courts have not been developed in the abstract. Rather, they have been fashioned with specific reference to the status asserted by the party whose standing is challenged and to the type of question he wishes to have adjudicated. We have noted that, in deciding the question of standing, it is not relevant that the substantive issues in the litigation might be non-justiciable. However, our decisions establish that, in ruling on standing, it is both appropriate and necessary to look to the substantive issues for another purpose, namely, to determine whether there is a logical nexus between status asserted and the claim sought to be adjudicated." 392 U.S. at pp. 101-102.

The necessary and logical nexus of respondent-physicians clearly is present within their professional practice, within their professional relationship with their patients, within their concern for their patients' health and rights and within their financial concerns. As noble as the medical profession may be, it is nevertheless a means of livelihood for physicians. They have a direct and ascertainable pecuniary interest in receiving payment for services rendered. Medicaid assistance payments are "made *on behalf* of those eligible needy persons." (Section 208.152, Mo. R.S. [Supp. 1973]). (Emphasis supplied). Payment is not made to the patient but directly to the doctor who renders the medical service.

The financial stake of respondents far exceeds the *de minimus* economic interest of plaintiff Florence *Flast, supra* at p. 15. The true motivating force for both Flast and respondents herein is the preservation of fundamental constitutional rights. Respondents respectfully suggest that their interests in these pro-

ceedings are motivated other than as so derogatorily suggested by petitioner in his brief.

> "The respondent-physicians are seeking to expand the range of circumstances which will, in the future, enable them to feed at the public trough." (Ptn. Br. p. 11).

Respondents unquestionably not only allege but possess "a personal stake in the outcome of the controversy as to assure that concrete adverseness," so necessary for the resolution of constitutional questions.[14]

A parameter of "logical nexus" has never been that the complaining party be a member of the class "excluded"[15] or of the class "affected"[16] in order to have requisite standing. The fact that indigent welfare women may have a clearer or more direct claim of standing in no manner diminishes the rightful standing claims of respondent-physicians.

> "There are no better or worse plaintiffs, only those with or without a claim."[17]

C. **The standing of respondent-physicians to assert the rights of their pregnant, indigent patients.**

1. *The Inseparability of the Physician-Patient Relationship in the Abortion Context.*

The vitality of the doctor-patient relationship does not permit its dichotomy into two component parts. This is particu-

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[14] *Baker,* et al. v. *Carr,* et al., 369 U.S. 186, 204 (1962)

[15] *Taylor* v. *Louisiana,* 419 U.S. 522, 526 (1975).

[16] *Stanton* v. *Stanton,* 95 S.Ct. 1373, 1376, 43 L.Ed.2d 688, 693 (1975).

[17] Albert, *Standing to Challenge Administrative Action: An Inadequate Surrogate for Claim for Relief,* 83 YALE L.J. 425, 426 (1974).

larly true in the area of abortion, where this Honorable Court placed great emphasis upon the physician in stating that,

> "(F)or the period of pregnancy prior to this 'compelling' point, the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that, in his medical judgment, the patient's pregnancy should be terminated." *Roe, supra* at p. 10, 410 U.S. at p. 163.

Only an appropriately safeguarded medical judgment was afforded constitutional protection by this Honorable Court in *Roe* and *Doe*, *supra* at p. 10. Retroactivity of those decisions has been granted to physicians[18] but denied to non-physicians.[19]

As early as 1971 the federal court in *Doe*, et al. v. *Scott*, etc., et al., 321 F.Supp. 1385, 1387-1388 (N.D.Ill. 1971) held,[20]

> "(T)he physician-plaintiffs have standing to raise the claims of their patients even if we assume that no independent claim of theirs could withstand a motion for judgment on the pleadings. All plaintiffs thus have standing to raise the claims which they assert."

Numerous other federal courts have specifically held that physicians have the necessary standing to assert the constitutional rights of their patients in the abortion context.

> "Moreover, the violations of their constitutional rights alleged by plaintiff-physicians are closely interwoven with

[18] *United States* ex rel. *Williams, II*, v. *Preiser*, etc., et al., 497 F.2d 337 (2nd Cir. 1974), *cert. denied*, 419 U.S. 1058 (1974). *Vuitch* v. *Hardy*, etc., 473 F.2d 1370 (4th Cir. 1973), *cert. denied*, 414 U.S. 824 (1973).

[19] *Cheaney* v. *State of Indiana*, 259 Ind. 138 (1972), 285 N.E. 2d 265, *cert. denied*, 410 U.S. 991 (1973).

[20] *Vacated and remanded* sub nom. *Hanrahan*, etc. v. *Doe*, et al., 410 U.S. 950 (1973).

> and inseparable from the allegations they make on behalf of their women patients for violations of their constitutional rights."
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> "Thus, it is appropriate here to grant plaintiff-physicians standing to litigate the alleged deprivations of the constitutional rights of their women patients."[21]

Physicians have previously been found by this Honorable Court to have standing to protect their patients rights to use[22] and to have access[23] to contraception.

In the analogous situation of the attorney-client relationship it has been held that,

> "(A) lawyer has standing to challenge any act which interferes with his professional obligation to his client and thereby, through the lawyer, invades the client's constitutional right to counsel."[24]

2. *The Necessity for the Physicians' Assertion of Patients' Rights.*

Respondents have not only the right but perhaps as well the professional and moral obligation to protect the rights of their

[21] *Young Women's Christian Association of Princeton, New Jersey*, et al. v. *Kugler*, etc., 342 F.Supp. 1048, 1055 (D.N.J. 1972), *cert. denied*, 415 U.S. 989 (1974). See, also, *Crossen*, et al v. *Breckenridge*, etc., et al., 446 F.2d 833, 840 (6th Cir. 1971), *vacated and remanded*, 410 U.S. 950 (1973).

[22] *Griswold*, et al. v. *Connecticut*, 381 U.S. 479, 481 (1965).

[23] *Eisenstadt*, etc. v. *Baird*, 405 U.S. 438, 443-446 (1972). *Population Services International*, et al., *supra* at fn. 7.

[24] *Wounded Knee Legal Defense/Offense Committee*, et al. v. *The Federal Bureau of Investigation*, et al., 507 F.2d 1281, 1284 (8th Cir. 1974).

patients. Certainly, the prospect of a single, indigent pregnant woman judicially challenging the statute through the various appellate levels of federal proceedings, in order to recover a $75.00 reimbursement to her physician, is formidable, if not herculean. By the very nature of her defined indigency, she would be forced to rely upon the charity and gratuity of counsel. Court fees and out-of-pocket expenses alone would vastly exceed the amount of recovery sought. She would be subject to "harassment due to the controversial nature of the subject matter of this action."[25] This consideration of the issue of standing has been previously recognized by this Honorable Court.

> "Finally, pragmatic considerations argue strongly for the standing of publishers in cases such as the present one. The distributor who is prevented from selling a few titles is not likely to sustain sufficient economic injury to induce him to seek judicial vindication of his rights. The publisher has the greater economic stake, because suppression of a particular book prevents him from recouping his investment in publishing it. Unless he is permitted to sue, infringement of freedom of the press may too often go unremedied. Cf. *NAACP* v. *Alabama ex rel. Patterson*, 357 U.S. 449, 459."[26]

As the Seventh Circuit has noted in the abortion context,

> "It is not at all inconceivable that women who seek abortions will be dissuaded from challenging restrictions on their right to one during the first trimester, . . . This would then leave unchallenged, except for the efforts of

[25] *Doe*, et al. v. *Poelker*, etc., et al., 515 F.2d 541, 542 at fn. 1 (8th Cir. 1975).

[26] *Bantam Books, Inc.*, et al. v. *Sullivan*, et al., 372 U.S. 58, 65 at fn. 6 (1963).

> these plaintiffs, the allegedly impermissible restrictions on a pregnant woman's right of privacy."[27]

Such a situation is even more conceivable under the circumstances of the case at bar, where the class of pregnant women is, by definition, indigent and frequently lack formal education, sophistication and the other badges of indigency; all of which would discourage attempts to vindicate judicially the deprivation of their constitutional rights.

In addition to the unanimous appellate panel's holding below of the standing of respondent-physicians (508 F.2d at pp. 1213-1214) (Apx. pp. 68-70), an unanimous appellate court panel within the Sixth Circuit has affirmed the District Court's ruling that physicians have standing when challenging the exclusion of state medicaid for the payment of abortion.[28]

> "With regard to the standing of the plaintiff physicians, recent cases have settled the right of physicians in the practice of medicine to assert their constitutional rights to advise and perform abortions for indigent women. Doe v. Bolton, 410 U.S. 179, 187-89, 93 S.Ct. 739, 35 L.Ed.2d 201 (1973). Crossen v. Breckenridge, 446 F.2d 833, 839-40 (6th Cir. 1971). That plaintiff physicians in this case are not threatened with criminal prosecutions does not compel a different result. Nyberg v. City of Virginia, 495 F.2d 1342, 1344 (8th Cir. 1974); Wulff v. Singleton, 508 F.2d 1211 (8th Cir. 1974)." 515 F.2d at p. 281.

The necessity and desirability of protecting the rights of a class, by allowing suit to be brought by another injured party,

[27] *Friendship Medical Center, Ltd.*, et al. v. *The Chicago Board of Health*, et al., 505 F.2d 1141, 1148 (7th Cir. 1974), *cert. denied*, 420 U.S. 997 (1975).

[28] *Roe*, et al. v. *Ferguson*, et al., 389 F.Supp. 387, 388 (S.D. Ohio 1974), *remanded for determination of constitutional grounds*, 515 F.2d 279 (6th Cir. 1975).

has been allowed in cases where an organization has litigated on behalf of its members.[29] The compelling reason of preserving anonymity applies equally as well here.

Identically, standing has repeatedly been granted to providers of medical services when challenging the state's administration of the federal grant program establishing state medical assistance programs under 42 United States Code, Section 1396, *et seq.*

> "(P)laintiffs as recipients of payments would have standing for themselves and for the interest of those served by them to assert these claims in view of the relationship to the indigents cared for."[30]

Certainly, no valid distinction may be drawn between medical institutions and individual physicians, as recipient payees of the program and as providers of services, when analyzed for the purposes of standing on behalf of their indigent patients.

Petitioner fails to cite a single instance in which physicians have been held not to have standing on behalf of their patients to raise the constitutional rights of the latter within the medical sphere.

3. *The General Exceptions Permitting Constitutional* Jus Tertii.

It has been suggested in regard to the concept of *jus tertii*,

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[29] See, *e.g.*: *National Association for the Advancement of Colored People* v. *Alabama* ex rel. *Patterson*, etc., 357 U. S. 449, 459-460 (1958); and *National Motor Freight Traffic Association, Inc.*, et al. v. *United States*, et al., 372 U.S. 246, 247 (1963).

[30] *Seneca Nursing Home*, et al. v. *The Kansas State Board of Social Welfare*, et al., 490 F.2d 1324, 1329 (10th Cir. 1974), *cert. denied*, 419 U.S. 841 (1974). See, also: *Harmony Nursing Home, Inc.* v. *Anderson*, etc., et al., 341 F. Supp. 957, 959 (D. Minn. 1972); and *Massachusetts General Hospital* v. *Rate Setting Commission*, et al., 359 Mass. 157 (1971), 269 N.E.2d 78.

> "Three considerations, none of which is of controlling significance, seem to recur: first, the presence of some substantial relationship between the claimant and the third parties; second, the impossibility of the rightholders' asserting their own constitutional rights; and third, the need to avoid a dilution of third parties' constitutional rights that would result were the assertion of jus tertii not permitted."[31]

Respondents suggest that, although any one of the three may sustain *jus tertii*, in fact, all have been demonstrated, *supra*, to be sufficient and manifest in this cause.

4. *Standing By Virtue of the Statute's Overbreadth.*

This Honorable Court has consistently held claimants to have standing when challenging statutes as overbroad in the area of First Amendment rights. *Bigelow* v. *Commonwealth of Virginia*, 95 S.Ct. 2222, 2229-2230, 44 L.Ed.2d 600, 608-609 (1975). Such attacks have also been permitted outside the "free speech" context. *Aptheker*, et al. v. *Secretary of State*, 378 U.S. 500 (1964), involved passport regulations, and *Berger* v. *New York*, 388 U.S. 41 (1967), involved electronic searches.

The right to an abortion has been recognized as a basic fundamental right (*Roe, supra* at p. 10, 410 U. S. at p. 155) and the extension of standing to physicians as a result of the challenged statute's overbreadth, when applied to their indigent patients, is natural, logical and warranted. Unques-

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[31] NOTE, *Standing to Assert Constitutional Jus Tertii*, 88 HARV. L. REV. 423, 425 (1974): Citing *Eisenstadt, supra* at fn. 23, *Griswold, supra* at fn. 22 and *National Association for the Advancement of Colored People* v. *Alabama* ex rel. *Patterson*, etc., 357 U.S. 449 (1958) for the first; citing *Eisenstadt* and *NAACP, id.* for the second; and citing *Eisenstadt, id., Griswold, id.*, and *Barrows*, et al. v. *Jackson*, 346 U.S. 249 (1953) for the third consideration.

tionably, the challenged statute is facially overbroad by reason of its failure to exclude the period of gestation prior to viability (*Roe, id.*, 410 U.S. at p. 164) and respondent-physicians, accordingly, have standing by reason of the challenged legislation's overbreadth.

5. *Petitioner's Counter-Arguments*

Petitioner maintains that the tests to measure standing "have become increasingly exclusive during the last decade and a half." (Ptn.Br. pp. 6, 11). Overwhelmingly, commentators disagree.[32] Petitioner argues that the challenged statute "includes no restriction on the performance of abortions by licensed physicians and surgeons." (Ptn.Br. p. 10). Such a view is not only myopic but unrealistic.

> "As the Supreme Court made clear in Doe v. Bolton, it is not only complete proscription of abortion which is unconstitutional, but barriers which 'unduly restrict' the rights of the woman, *see* 410 U.S. at 198, 93 S.Ct. 755." *Doe*, et al. v. *Hale Hospital*, et al., 500 F.2d 144, 146 (1st Cir. 1974), *cert. denied*, 420 U.S. 907 (1975).
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> "The pregnant woman may not be denied necessary medical assistance because she has made an unwarrantedly disfavored choice, and no other basis appears here for denying medical assistance."
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> "The directive, and the State statute, if interpreted as mandating the Commissioner's directive, would deny indigent women the equal protection of the laws to which they are constitutionally entitled. They alone are subjected to State coercion to bear children which they do not wish to bear, and no other women similarly situated are so coerced. Other women, able to afford the medical cost of either a justifiable abortional act or full term child birth, have complete freedom to make the choice in the light of the manifold of considerations directly relevant to the problem uninhibited by any State action. The indigent is advised by the State that the State will deny her medical assistance unless she resigns her freedom of choice and bears the child. She is denied the medical assistance that is in general her statutory entitlement, and that is otherwise extended to her even with respect to her pregnancy. She is thus discriminated against both by reason of her poverty and by reason of her behavioral choice."[33]

Petitioner's attempt to analogize respondent-physicians to patients' landlords falls flat (Ptn.Br. at p. 21) and cavalierly ignores the traumatic realities of an unwanted pregnancy. *Roe, supra* at p. 10, 410 U.S. at 153.

As so aptly stated by this Honorable Court,

> "(C)onstitutional rights . . . not to be discriminated against . . . can neither be nullified openly and directly by state legislators or state executive or judicial officers, nor nullified indirectly by them through evasive schemes . . . whether attempted 'ingeniously or ingenuously.' "[34]

While the challenged statute is void of criminal sanctions, this state of affairs is not synonymous with petitioner's state-

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[32] See, *e.g.*: Sedler, *Standing, Justiciability, and All That: A Behavioral Analysis*, 25 VAND. L. REV. 479, 487-488 (1972); Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1380-1383 (1973); Albert, *Standing to Challenge Administrative Action: An Inadequate Surrogate for Claim for Relief*, 83 YALE L. J. 425, 473-476; Scott, *Standing in the Supreme Court—A Functional Analysis*, 86 HARV. L. REV. 645-646 (1973); and NOTE, *Standing to Assert Constitutional Jus Tertii*, 88 HARV.L.REV. 423, 425, 427 (1974).

[33] *Klein*, et al. v. *Nassau County Medical Center*, et al., 347 F. Supp. 496, 500 (E.D.N.Y. 1972), *affirmed* sub nom. *Ryan* v. *Klein*, et al., 412 U.S. 924 (1973).

[34] *Cooper*, et al. v. *Aaron*, et al., 358 U.S. 1, 17 (1958).

ment that "(i)t does not provide sanctions against anyone, including respondents". (Ptn.Br. p. 17). The sanction of non-payment and the interference inflicted by this fact, upon the patient's hesitancy and/or inability to seek medical assistance in the first instance and upon the physician-patient relationship once initiated, is self-evident. The sanctions imposed by the challenged statute upon the pregnant indigent woman were best stated by the unanimous District Court panel in New York.[35]

Petitioner relies heavily on the fact that administrative remedies are statutorily provided by the State of Missouri only to respondents' patients and not to respondents themselves. (Ptn. Br. p. 22). This argument ignores the jurisdictional basis of 42 United States Code, Section 1983 of this action (Apx. p. 10) and the right of the welfare recipients to bypass administrative relief and seek direct relief in federal court from a denial of equal protection.[36]

Petitioner finally relies extensively on the recent decision of this Honorable Court in *Warth*, etc., et al. v. *Sedlin*, et al., 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975). (Ptn.Br. pp. 23-29). No rational parallels can be drawn between respondents and the four classes of plaintiffs in *Warth, supra.*

a. Plaintiffs Ortiz, *et al.*, were held to,

> "(R)ely on little more than the remote possibility, unsubstantiated by allegations of fact, that their situation might have been better had respondents acted otherwise, and might improve were the court to afford relief."[37]

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[35] *Klein*, et al., *supra* at pp. 24-25.

[36] See, *e.g.*: *Damico*, et al. v. *California*, et al., 389 U.S. 416, 417-418 (1967); and *Hagans*, et al. v. *Lavine*, etc., et al., 415 U.S. 528, 536 (1974). See, also, cases at fn. 30, *supra.*

[37] 95 S.Ct. at pp. 2209-2210, 45 L.Ed.2d at p. 360.

Respondents in this cause have specifically alleged in their "Complaint" (Apx. pp. 9-17) and their "Affidavits"[38] (Apx. pp. 29-36) past injury to themselves and to their patients through actual refusals by petitioner to pay for abortion procedures; as well as continuing injury through petitioner's perpetuation of said policies pursuant to the challenged statute.

b. Plaintiff taxpayers of Rochester, New York, did not allege nor show,

> "(T)hat the challenged . . . ordinance . . . preclude or otherwise adversely affect a relationship existing between them and the persons whose rights assertedly are violated . . . (that a) relationship, other than an incidental congruity of interest, . . . exist between the Rochester taxpayers and persons who have been precluded . . . (and) that their prosecution of the suit is necessary to insure protection of the rights asserted . . ."[39]

Respondents in this cause specifically allege in paragraph 9, subsections (b), (e) and (g) of their "Complaint" (Apx. pp. 12-13) and paragraphs 8 and 9 of their "Affidavits" (Apx. pp. 31-32, 35-36) the affect of the challenged statute upon the physician-patient relationship (a relationship unquestionably greater than an "incidental congruity of interest"). The patent desirability of allowing respondent-physicians to pursue these rights has been more fully explored, *supra.*[40]

c. Plaintiffs Metro-Act of Rochester, Inc., *et al.* attempted "to raise putative rights of third parties" and did,

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[38] For the propriety of reliance upon such "Affidavits", distinct from the "Complaint", see *Warth, supra*, 95 S.Ct. at pp. 2206-2207, 45 L.Ed.2d at p. 356.

[39] *Warth, supra*, 95 S.Ct. at p. 2211, 45 L.Ed.2d at p. 361.

[40] See, pp. 19-22, *supra.*

> ". . . not allege that a contractual or other relationship . . . existed between its Penfield members and any particular person excluded . . . nor that any such relationship was either punished or disrupted . . ."[41]

Respondents in this cause have not only a contractual relationship with their patients but a relationship exposing them to civil liability for malpractice should they negligently err in their treatment; regardless of whether respondent-physicians were paid by their patients for the services rendered or whether the patients incurred an obligation to pay.[42] The deleterious effect of the challenged statute has been previously referred to and is set out in paragraph 9, subsections (b), (e) and (g) of respondents' "Complaint" (Apx. pp. 12-13) and paragraphs 8 and 9 of their "Affidavits". (Apx. pp. 31-32, 35-36).

d. Plaintiff Home Builders failed to allege "monetary injury to itself"[43] and the damage claims of its members were "not common to the entire membership, nor shared by all in equal degree."[44] Plaintiff Penfield Better Homes Corporation alleged no facts to evidence "a live, concrete dispute" in 1972 when suit was filed, although such a claim may well have existed in 1969.[45]

Respondents in this cause do not prosecute this action within an organizational guise and the past, pending and prospective damage and injury to respondent-physicians, their patients and their mutual relationship is both real and manifest.

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[41] *Warth, supra*, 95 S.Ct. at p. 2213 and 2213 at fn. 22, 45 L.Ed. 2d at p. 364 and 364 at fn. 22.

[42] *Persten v. Chesney*, et al., 212 S.W.2d 469, 473 (Mo. Ct. App. 1948).

[43] *Warth, supra*, 95 S.Ct. at p. 2214, 45 L.Ed.2d at p. 364.

[44] *Ibid.*

[45] *Warth, supra*, 95 S.Ct. at pp. 2214-2215, 45 L.Ed.2d at pp. 365-366.

Lastly, petitioner callously suggests that respondents' interest is purely economic as potential "recipient of public funds paid out in support of optional surgical processes", similar in degree to "silicone transplants". (Ptn.Br. p.29). This Honorable Court in *Roe* and *Doe, supra* made clear that termination of a pregnancy was far removed from the general class of elective, cosmetic surgery.[46]

> "(P)regnancy is not an abnormal condition, nor does the medical assistance in child birth 'cure' it. Medical assistance for abortion is not less 'necessary' because an election to bear the child would obviate that medical assistance and require instead other, more extensive and more expensive medical assistance."[47]

II

The Court of Appeals Did Not Act in Excess of Its Jurisdiction When It Proceeded to Determine on the Merits the Constitutionality of Section 208.152, Missouri Revised Statutes (Supp. 1973).

A. Introduction.

Respondents do not quarrel with the general principles of law cited by petitioner, that ordinarily matters will not be reached on appeal that have not been decided below and that ordinarily constitutional questions should not be first considered on appeal. (Ptn. Br. p. 34). Nevertheless, even in the very cases cited by petitioner for the former rule, it was clearly recognized that the principle is not an absolute one, but only one applied "ordinarily" (*Eureka-Carlisle Company* v. *Rottman*, etc., 398 F.2d

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[46] *Roe, supra* at p. 10, 410 U.S. at p. 153.

[47] *Klein, supra* at fn. 33, 347 F.Supp. at p. 500.

1015, 1019 [10th Cir. 1968]), one the court may choose to "decline" (*Equal Employment Opportunity Commission* v. *Standard Forge and Axle Company, Inc.*, 496 F.2d 1392, 1394 [5th Cir. 1974]) and one to be discretionally not "considered" when "not presented to the court below" (*Fitts* v. *United States of America*, 376 F.2d 516 [10th Cir. 1967]). (All cited by petitioner in Ptn. Br. p. 34). In each of the cases cited by petitioner the issue in question had neither been raised nor presented to the District Court nor considered by it. Contrarily, in the instant case the merits were raised and presented directly to the District Court, which chose not to confront them by avoiding them through a collateral ruling on standing.

In *Equal Employment Opportunity Commission, supra,* the Appellate Court reversed the District Court and the need to rule upon the issue presented by appellant was thereby obviated. 496 F.2d at p. 1394. In *Eureka-Carlisle Company, supra,* the Appellate Court noted that the issue presented by appellant had been specifically waived at oral argument. 398 F.2d at pp. 1019-1020.

Similarly, in *Giordano v. United States*, 394 U.S. 310 (1969), *Bandy* v. *United States of America*, 396 F.2d 929 (8th Cir. 1968), *cert. denied*, 393 U.S. 1004 (1968), and *Gardner*, etc. v. *Meyers*, et al., 491 F.2d 1184 (8th Cir. 1974), all cited by petitioner for the latter rule (Ptn. Br. p. 34), the constitutional issue was never raised nor presented to the District Court.[48] In the present cause the constitutional issue was squarely and exclusively before the District Court, which chose not to decide it.

The Appellate Court below correctly chose to rule upon the merits before it and in so doing properly applied the applicable principles of law to the pressing and peculiar circumstances be-

[48] Respondents express serious doubts as to whether *Giordano, supra,* supports even the general principle for which cited by petitioner.

fore it. Petitioner fails to discuss the frequently recognized and applied exceptions to the hornbook law which he seeks to utilize in blanket fashion in this cause. The authority of appellate courts to decide issues left unresolved by lower courts is equally well recognized.

This Honorable Court, as early as 1941, acknowledged that,

> "Ordinarily an appellate court does not give consideration to issues not raised below. For our procedural scheme contemplates that parties shall come to issue in the trial forum vested with authority to determine questions of fact. This is essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues which the trial tribunal is alone competent to decide; it is equally essential in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence."
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> "But those cases do not announce an inflexible practice, as indeed they could not without doing violence to the statutes which give to Circuit Courts of Appeals reviewing decisions . . . the power to modify, reverse or remand decisions not in accordance with law 'as justice may require.' There may always be exceptional cases or particular circumstances which will prompt a reviewing or appellate court, where injustice might otherwise result, to consider questions of law which were neither pressed nor passed upon by the court . . . below."
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> "Rules of practice and procedure are devised to promote the ends of justice, not to defeat them. A rigid and undeviating judicially declared practice under which courts of review would invariably and under all circumstances decline to consider all questions which had not previously been

specifically urged would be out of harmony with this policy. Orderly rules of procedure do not require sacrifice of the rules of fundamental justice."[49]

The existence of recognized exceptions to the general "black-letter" rule, when circumstances and justice dictate, has been recognized by every Appellate Circuit.[50]

B. **The factors to be considered.**

What becomes readily apparent from a review of the cases is that the power to consider points of law and/or fact upon ap-

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[49] *Hormel* v. *Helvering*, etc., 312 U.S. 552, 556-557 (1941). See, *Adickes* v. *S. H. Kress & Company*, 398 U.S. 144, 147 at fn. 2 (1970); and *Anderson*, et al. v. *United States*, 417 U.S. 211, 217 at fn. 5 (1974).

[50] *Securities and Exchange Commission*, et al. v. *Milner*, etc., et al., 474 F.2d 162, 166 (1st Cir. 1973); *Dobb*, etc. v. *Baker*, et al., 505 F.2d 1041, 1044 (1st Cir. 1974); *Shapiro, Bernstein & Co., Inc.*, et al. v. *Continental Record Co., Inc.*, 386 F.2d 426, 427 (2nd Cir. 1967); *Green* v. *Brown*, et al., 398 F.2d 1006, 1009 (2nd Cir. 1968); *Kohn*, etc., et al. v. *American Metal Climax, Inc.*, et al., 458 F.2d 255, 262 (3rd Cir. 1972), *cert. denied*, 409 U.S. 874 (1972); *O'Neill*, et al. v. *United States of America*, 411 F.2d 139, 143-144 (3rd Cir. 1969); *Toyomenka, Inc.*, et al. v. *Mount Hope Finishing Company*, 432 F.2d 722, 727 at fn. 10 (4th Cir. 1970); *McDougall* v. *Dunn*, 468 F.2d 468, 476 (4th Cir. 1972); *Empire Life Insurance Company of America* v. *Valdak Corporation*, 468 F.2d 330, 334 (5th Cir. 1972); *Evans*, et al. v. *Triple R Welding & Oil Field Maintenance Corporation*, 472 F.2d 713, 716 (5th Cir. 1973); *City of Memphis, Tennessee* v. *Southern Bell Telephone and Telegraph Company*, 316 F.2d 535, 537 (6th Cir. 1963); *United States of America* v. *Whitehead*, 424 F.2d 446, 448 (6th Cir. 1970); *United States of America*, etc. v. *The Home Indemnity Company*, et al., 489 F.2d 1004, 1007 (7th Cir. 1973); *Johnson*, et al. v. *United States*, 434 F.2d 340, 342 (8th Cir. 1970); *Word*, et al. v. *Poelker*, etc., et al., 495 F.2d 1349, 1350 (8th Cir. 1974); *Krause*, etc. v. *Sacramento Inn*, et al., 479 F.2d 988, 989-990 (9th Cir. 1973); *K-2 Ski Company v. Head Ski Co., Inc.*, et al., 506 F.2d 471, 475 (9th Cir. 1974); *Gomes* v. *Williams*, 420 F.2d 1364, 1367 (10th Cir. 1970); *E.F. Corporation* v. *Smith*, etc., 496 F.2d 826, 829 (10th Cir. 1974); *In re Elmore*, 382 F.2d 125, 127 (D.C.C. 1967); and *Miller* v. *Avirom*, 384 F.2d 319, 322-323 (D.C.C. 1967).

peal, even though the same may not have been pressed upon the trial court as they were hereinbelow, lies largely within the discretion of the appellate court. Respondents submit that the circumstances of this cause below manifestly confirm the appropriateness and correctness of the Appellate Court's actions. Of equal weight to those principles of law suggested by petitioner is the fact that,

> "It is well established that as a matter of discretion, an appellate court may pass upon issues not pressed before it or raised below when the ends of justice will be best served by doing so."[51]

The applicable rule of law has always been that,

> "Once a timely appeal is taken from an order made appealable by statute, the power of a court of appeals should be plenary to the extent that it chooses to exercise it. A court should not close its eyes to what is plainly there. . . . once a case is lawfully before a court of appeals, it does not lack power to do what plainly ought to be done."[52]

An appellate court's decision to consider the merits of the case upon appeal, although not decided below, is a matter of judicial discretion and is "not a limit on jurisdictional power."[53]

1. *The Summary Judgment Nature of the Proceedings.*

Appellate courts have frequently decided questions on the merits, although not decided below, when the issues were appropriate for summary-type judgment proceedings and no fac-

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[51] *Empire Life Insurance*, etc., *supra* at fn. 50, 468 F.2d at p. 334.

[52] 9 MOORE'S FEDERAL PRACTICE 273 (Cum. Supp. 1974).

[53] *Mercury Motor Express, Inc.*, et al. v. *Brinke*, 475 F.2d 1086, 1091 (5th Cir. 1973).

tual matters were in dispute. Appellate courts may determine independently that no genuine issues of fact exist.[54]

> "We believe an appellate court has the power to order summary judgment for appellant . . . where he made no motion . . . in the trial court . . ." 6 *Moore's Federal Practice*, 2977 (Cum.Supp. 1974).

It is appropriate to consider matters on appeal when "a pure question of law is involved".[55]

It has long been a general rule of law that appellate courts in cases involving clear and unequivocal issues, capable of only a singular determination, may decide the matter on the merits rather than remanding the same.

In *Levin* v. *Mississippi River Fuel Corp.*, et al., 386 U.S. 162 (1967) involving a construction of Missouri state law and which arose within the Eighth Circuit, this Honorable Court stated,

> "Indeed, this point is so clear that we see no occasion for remanding the issue to the Court of Appeals for its consideration of the point, even though it be assumed that its opinion does not decide it. Effective judicial administration requires that we dispose of the matter here." 386 U.S. at pp. 169-170.

In *Hurwitz*, et al. v. *Directors Guild of America, Incorporated*, 364 F.2d 67 (2nd Cir. 1966), *cert. denied*, 385 U.S. 971 (1966), a case on appeal from an order denying plaintiffs' request for a preliminary injunction, the Court of Appeals reversed, holding for plaintiffs on the merits.

> "As a general rule, when an appeal is taken from the grant or denial of a preliminary injunction, the reviewing court

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[54] *Capital Temporaries, Inc. of Hartford*, et al. v. *The Olsten Corporation*, 506 F.2d 658, 667 (2nd Cir. 1974).

[55] *Evans*, et al., *supra* at fn. 50, 472 F.2d at p. 716.

> will go no further into the merits than is necessary to decide the interlocutory appeal. See Ex parte National Enameling & Stamping Co., 201 U.S. 157, 162, . . . However, this rule is subject to a general exception—the appellate court may dismiss the complaint on the merits if its examination of the record upon an interlocutory appeal reveals that the case is entirely void of merit. See, e.g., Mast, Foos & Co. v. Stover Mfg. Co., 177 U.S. 485, 495, . . ."
>
> "Such an exception serves the obvious interest of economy of litigation, and this interest is equally served if the appellate court directs a verdict for plaintiff in an appropriate case. We have found no case reaching this result, but this is not surprising since it is the rare case that contains no triable issue of fact, and it is rarer still that this would result in a judgment for the plaintiff at the pretrial stage. In Meccano, Ltd. v. John Wanamaker, 250 F. 450 (2 Cir. 1919), aff'd, 253 U.S. 136, 141-142, 40 S.Ct. 453, 64 L.Ed. 822 (1920), we expressly refused to pass upon this question because the plaintiff did not warrant final relief. Finding no reason why the cautious exercise of such a power would be undesirable, we conclude that we may direct the entry of a judgment for the plaintiffs here." 364 F.2d at p. 70.

In point is *The Board of Managers of the Arkansas Training School for Boys at Wrightsville*, et al. v. *George*, et al., 377 F.2d 228 (8th Cir. 1967), *cert. denied*, 389 U.S. 845 (1967). The Appellate Court decided the merits on appeal and held,

> "It would clearly be a 'contradiction of reason' to attempt to enjoin the state from enforcement of a statute and at the same time not pass upon the constitutionality of the statute. Cf. United States ex rel. McNeill v. Tarumianz, 3 Cir., 242 F.2d 191. Moreover it is not necessary to attack statutes by specific pleading which on their face are

unconstitutional. Turner v. City of Memphis, 369 U.S. 350, 82 S.Ct. 805, 7 L.Ed.2d 762."

"We are also mindful that the present appeal comes to us on a motion to dismiss with a limited record. Appellant has not even filed its answer. We adhere to the proposition that it would be improper to consider 'grave constitutional questions' where there exists 'reasonable likelihood' that further proceedings could help clarify the issues. Borden's Farm Products Co. v. Baldwin, 293 U.S. 194, at 213, 55 S.Ct. 187, 79 L.Ed. 281. However, in the present proceeding no further pleadings or evidence is necessary for 'refinement or clarification of issues.' United States v. Petrillo, 332 U.S. 1, 67 S.Ct. 1538, 91 L.Ed. 1877; United States v. Fabro, Inc., M.D. Ga., 206 F.Supp. 523. And we should dispose of all controversies 'as expeditiously as is consistent with proper judicial administration.' Turner v. City of Memphis, 369 U.S. 350, 82 S.Ct. 805, 7 L.Ed2d 762." 377 F.2d at p. 231.

Similarly, is *Word*, et al. v. *Poelker*, etc., et al., 495 F.2d 1349 (8th Cir. 1974), in which a unanimous panel similarly ruled statutory abortion restrictions to be facially unconstitutional, although the cause below had been dismissed without a ruling on the merits.

> "The issue in this case relates to the facial constitutionality of the St. Louis city ordinance when viewed against the backdrop now available in the *Roe* and *Doe* decisions. That determination can be made on the record before us. We choose to make that determination. *See*, Wisconsin v. Constantineau, *supra* at 439 of 400 U.S., 91 S.Ct. 507; Baggett v. Bullitt, 377 U.S. 360, 375-379, 84 S.Ct. 1316, 12 L.Ed. 2d 377 (1964)." 495 F.2d at p. 1350.

Appellate Courts have also ruled on the merits when considering the appropriateness of interlocutory relief and when

the issues were capable of legal resolution as then spread upon the record.[56]

The Appellate Court below correctly viewed the cause as involving strictly legal issues and thus appropriate for decision. In nine other federal suits challenging identical legislation in other states, summary disposition of the issues has occurred.[57] Petitioner cites not one case to the contrary.

2. *The Clarity of the Principle.*

Prior to the decision by the Appellate Court below on December 31, 1974, fifteen federal judges had held identical statutes in five other states unconstitutional (with only a single dissent being recorded), on the identical ground of equal protection denial under the Fourteenth Amendment.[58] Subsequent

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[56] *Aerojet-General Corporation* v. *The American Arbitration Association*, 478 F.2d 248, 252-253 (9th Cir. 1973); and *Kohn*, *supra* at fn. 50, 458 F.2d at p. 270.

[57] *Klein*, et al. v. *Nassau County Medical Center*, et al., 347 F. Supp. 496, 498 (E.D.N.Y. 1972), *affirmed* sub nom. *Ryan* v. *Klein*, et al., 412 U.S. 924 (1973); *Doe*, et al. v. *Rose*, etc., 380 F. Supp. 779, 781 (D.Utah 1973), *affirmed*, 499 F.2d 1112, 1114 (10th Cir. 1974); *Doe* v. *Rampton*, et al., 366 F.Supp. 189, 192 (D. Utah 1973); *Doe*, et al. v. *Wohlgemuth*, et al., 376 F. Supp. 173, 177-178 (W.D. Penn. 1974), *affirmed on other grounds* sub nom. *Doe*, et al. v. *Beal*, etc., et al., — F.2d — (3rd Cir. 1975), *Roe*, et al. v. *Ferguson*, et al., 389 F.Supp. 387, 388 (S.D.Ohio 1974), *remanded for determination of constitutional grounds*, 515 F.2d 279 (6th Cir. 1975); *Doe*, et al. v. *Westby*, et al., 383 F.Supp. 1143, 1144 (D.S.D. 1974), *vacated and remanded on other grounds*, 420 U.S. 968 (1975); *Doe*, et al. v. *Myatt*, et al., —F.Supp. —(D.N.D. 1975); *Smith*, et al. v. *Tinder*, —F.Supp. — (S.D.W.V. 1975); and *Doe*, et al. v. *O'Bannon*, et al., —F.Supp. —(D. Minn. 1975).

[58] *Id.* Three federal judges in the New York case, seven federal judges in the Utah cases, two federal judges in the Pennsylvania cases and three federal judges in the South Dakota case. The sole dissent is contained in *Doe*, et al. v. *Wohlgemuth*, et al., *supra*, 376 F.Supp. at pp. 192-195.

to December 31, 1974, seven additional Federal judges have so held (without a single dissent being recorded) as to identical statutes in three additional states.[59]

3. *The Recognized Exceptions.*

The recognized instances in which appellate courts have similarly and consistently exercised the discretion to rule upon issues not squarely decided below include, among others: "where public policy requires";[60] "where a question of law is raised;"[61] "where, . . . a refusal to consider it would result in a miscarriage of justice";[62] where "the question sought to be raised is . . . so substantial . . . (or) material",[63] "wherein there are significant questions of general impact",[64] where it is "deemed necessary to reach the correct result",[65] "when fundamental rights are involved",[66] or where "the issues . . . raised are of great significance

[59] *Id.* Three federal judges in the North Dakota case, one federal judge in the Minnesota case, one federal judge in the West Virginia case, two federal judges in a Pennsylvania case (one judge finding the issue not justiciable). The issue in the Pennsylvania case was only one of many in a broad and encompassing abortion regulation statute. *Planned Parenthood Association*, et al. v. *Fitzpatrick*, et al., — F.Supp. — (E.D. Penn. 1975).

[60] *K-2 Ski Company* v. *Head Ski Co., Inc.*, et al., 506 F.2d 471, 475 (9th Cir. 1974).

[61] *Gomes* v. *Williams*, 420 F.2d 1364, 1367 (10th Cir. 1970).

[62] *Evans*, et al. v. *Triple R Welding & Oil Field Maintenance Corporation*, 472 F.2d 713, 716 (5th Cir. 1973).

[63] *Securities and Exchange Commission*, et al. v. *Milner*, etc., et al., 474 F.2d 162, 166 (1st Cir. 1973).

[64] *Krause*, etc. v. *Sacramento Inn*, et al., 479 F.2d 988, 989 (9th Cir. 1973).

[65] *Washington Gas Light Company* v. *Virginia Electric and Power Company*, 438 F.2d 248, 251 (4th Cir. 1971).

[66] *Wratchford*, et al., etc. v. *S. J. Groves & Sons Company*, et al., 405 F.2d 1061, 1063 (4th Cir. 1969).

in construing an act designed to protect thousands . . ."[67] Each and every one of these alternative elements are strongly present in this cause.

4. *The History of Abortion Litigation In Missouri.*

The presence of the aforementioned factors in this cause were compounded and complemented by the Appellate Court's familiarity with the history of federal district court decisions arising from abortion litigation in Missouri. This Honorable Court similarly has not been unaware of the same.

Such cases, challenging the constitutionality of state and municipal regulation within the United States District Court for the Eastern District of Missouri, Eastern Division, subsequent to *Roe* and *Doe*, *supra* at p. 10 are pertinent and revealing. (See, *e.g.*,: *Word*, et al. v. *Poelker*, etc., et al. [municipal regulation of abortion clinics], *dismissed on ground of abstention* [Unreported, E.D.Mo., No. 73C533(2), Oct. 4, 1973], *reversed on the merits*, 495 F.2d 1349 [8th Cir. 1974]; *Doe*, et al. v. *Poelker*, etc., et al. [public hospitals' prohibition on abortion], *dismissed for lack of standing* [Unreported, E.D. Mo., No. 73C565(A), Mar. 22, 1974], *reversed*, 497 F.2d 1063 [8th Cir. 1974], *dismissed on the merits* [Unreported, E.D.Mo., No. 73C565(A), Jan. 13, 1975], *reversed on the merits*, 515 F.2d 541 [8th Cir. 1975]; *Wulff*, et al. v. *State Board of Registration for the Healing Arts*, et al. [medicaid exclusion of benefits for abortion], *dismissed for lack of standing*, 380 F.Supp. 1137 [E.D.Mo. 1974], *reversed on the merits* sub nom. *Wulff*, et al. v. *Singleton*, etc., 508 F.2d 1211 [8th Cir. 1974]; and *Planned Parenthood of Central Missouri*, et al. v. *Danforth*, etc., et al. [upholding the constitutionality of a recently enacted state stat-

[67] *Green v. Brown*, et al., 398 F.2d 1006, 1009 (2nd Cir. 1968).

ute], 392 F.Supp. 1362 [E.D.Mo. 1975], *stayed and enjoined*, 420 U.S. 918 (1975).[68]

In addition, of the scores of federal cases dealing with abortion related legislation, it appears that only three cases were ever required by the courts to be conducted as full scale trials. Two of those trials occurred in Missouri.[69]

The tragedy of this legislative pattern and judicial experience is the existence of its provisions during the time necessary to

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[68] It should be noted that petitioner's counsel, the Honorable John C. Danforth, Attorney General of Missouri, appears to be the only state official ever enjoined by a federal court as to the enforcement of a pre-1973 abortion statute, in a decision relying upon *Roe* and *Doe*, *supra* at p. 10. The District Court did not feel that following this Honorable Court's lead in assuming compliance by defendants would be sufficient. *Roe, id.*, 410 U.S. at p. 166 and *Doe, id.*, 410 U.S. at p. 201.

> "In this case the defendant Attorney General has not given 'full recognition' or 'credence' to the ruling of the Supreme Court. It does not appear that a declaratory judgment in this case, in view of the Attorney General's publicly stated position, will suffice to guarantee the constitutional rights of pregnant women and their consulting doctors as decided by the Supreme Court, and, it is therefore
>
> ORDERED that the defendant Attorney General of the State of Missouri, and the defendant class of all Prosecuting Attorneys in the State of Missouri be, and they hereby are, enjoined from instituting any criminal prosecutions . . ." *Rodgers*, et al. v. *Danforth*, etc., et al. (Unreported, W.D.Mo., No. 18360-2, 1973), *affirmed*, 414 U.S. 1035 (1973). (Apx. p. 57).

Similarly, the chief executive officer of the State's major metropolitan area, the Honorable John H. Poelker, Mayor of the City of St. Louis, in a related abortion case was found by the Eighth Circuit to have acted in a manner characterized as "arbitrary", "obstinately", "intransigent", "wanton," "callous", "oppressive" and "obdurate". *Doe*, et al. v. *Poelker*, etc., et al., 515 F.2d 541, 546-548 (8th Cir. 1975).

[69] Trials were required in the District Court proceedings of *Doe*, et al. v. *Poelker*, etc., et al., (Unreported, E.D.Mo., No. 73C565 [A], Jan. 13, 1975), *reversed*, 515 F.2d 541, (8th Cir. 1975) and in *Planned Parenthood of Central Missouri*, et al. v. *Danforth*, etc., et al., 392 F.Supp. 1362 (E.D.Mo. 1975), *stayed and enjoined*, 420 U.S. 918 (1975). Trial was also conducted in *Planned Parenthood Association*, et al., *supra* at fn. 59.

obtain favorable appellate decisions. Every Missouri case to date has been often summarily and always adversely disposed of by the district court and preliminary injunctive relief denied. Every said case has been reversed or enjoined upon appeal.

C. **The inappropriateness for a statutory three-judge panel.**

1. *The Purpose and Intent of 28 United States Code, Section 2281.*

This Honorable Court has stated,

> "Congress established the three-judge court apparatus for one reason: to save state and federal statutes from improvident doom, on constitutional grounds, at the hands of a single federal district judge. But some of the literal words of the statutory apparatus bear little or no relation to that underlying policy, and in construing these we have stressed that the three-judge court procedure is not 'a measure of broad social policy to be construed with great liberality.' *Phillips* v. *United States*, 312 U.S. 246, at 251."
>
> . . .
>
> "The words of § 1253 governing this Court's appellate jurisdiction over orders denying injunctions fall within this canon of narrow construction. Whether this jurisdiction be read broadly or narrowly, there will be no impact on the underlying congressional policy of ensuring this Court's swift review of three-judge court orders that *grant* injunctions. Furthermore, only a narrow construction is consonant with the overriding policy, historically encouraged by Congress, of minimizing the mandatory docket of this Court in the interests of sound judicial administration." *Gonzalez* v. *Automatic Employees Credit Union*, et al., 419 U.S. 90, 97-98 (1974).[70]

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[70] See, *MTM, Inc.*, et al. v. *Baxley*, etc., et al., 420 U.S. 799, 804 (1975).

The Appellate Court below, after resting its portal jurisdiction upon *Gonzalez, supra* (508 F.2d at 1213) (Apx. pp. 66-67), proceeded to follow faithfully the teachings of *Gonzalez, supra*. The singular purpose of Section 1253 has been preserved, albeit on the appellate level, by an effort to minimize the dockets of both this Honorable Court and the lower District Court, in a manner consistent with the full exercise of sound judicial administration. While petitioner argues for the strict literal construction, the Appellate Court determined,

> "(I)n the interest of judicial economy and logic we should now address the merits of this controversy." 508 F.2d at p. 1214. (Apx. p. 70).

In fact, injunctive relief, which lies at the crux of 28 U.S.C., Section 2281 and without which a mere declaratory judgment of state action as unconstitutional requires merely a single judge, was not granted by the appellate court.[71]

2. *The Lack of Necessity for a Three Judge Panel.*

This Honorable Court further noted in *Gonzalez, supra*, that,

> "(T)hree judges are not in fact necessary where the unconstitutionality of the statute is obvious and patent . . ." 419 U.S. at p. 97 at fn. 14.

As to the question of obvious unconstitutionality, there are not only the identical equal protection state medicaid decisions cited *supra* at fns. 57 and 59, but a host of analogous equal protection public hospital cases, decided prior to December 31, 1974, upon which the Appellate Court below had to rely,[72] and in which not a single dissent appeared.

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[71] 508 F.2d at p. 1216. (Apx. p. 73).

[72] *Doe*, et al. v. *General Hospital of the District of Columbia*, et al., 313 F.Supp. 1170 (D.D.C. 1970), *affirmed*, 434 F.2d 423 (D.C.C. 1970) and *affirmed*, 434 F.2d 427 (D.C.C. 1970); *Nyberg*, et al. v. *The City of Virginia*, et al., 495 F.2d 1342 (8th Cir. 1974), *cert. denied*, 419 U.S. 891 (1974); *Doe*, et al. v. *Hale Hospital*, et al., 500 F.2d 144 (1st Cir. 1974), *cert. denied*, 420 U.S. 907 (1975); *Doe v. Mundy*, et al., 378 F.Supp. 731 (E.D.Wis. 1974), *affirmed*, 514 F.2d 1179 (7th Cir. 1975); and *Santiago* v. *Colon*, et al. (Unreported, D.P.R., No. 74-362, Aug. 6, 1974). Subsequent to December 31, 1974, the identical principle has been reaffirmed in *Doe*, et al. v. *Poelker*, etc., et al., 515 F.2d 541 (8th Cir. 1975).

Two other federal courts voiding identical medicaid provisions have held a three-judge panel to be unnecessary. One district judge voided the policy as a violation of equal protection[73] and the other as contravening federal law.[74]

D. **The issues were properly raised below.**

Petitioner does not contend that respondents' arguments on the merits were not properly raised below, although this has been the underlying reason for denying appellate review of issues not decided below in the cases cited by petitioner.

> "Although the rule is not absolute, a litigant cannot ordinarily expect to lose in the trial court on one theory and win on appeal under another."[75]
>
> "(A)n appellate court should not allow a party to attempt a whole new theory after he has been unsuccessful at trial."[76]

This rationale has no merit in the present cause, inasmuch as respondents have pursued the constitutional claims of the merits

[73] *Smith*, et al., *supra* at fn. 57.

[74] *Roe*, et al. v. *Norton*, et al., 380 F.Supp. 726, 728 (D.Conn. 1974), *reversed on other grounds*, —F.2d — (2nd Cir. 1975).

[75] *United States of America*, etc. v. *The Home Indemnity Company*, et al., 489 F.2d 1004, 1007 (7th Cir. 1973).

[76] *Empire Life Insurance*, etc., *supra* at fn. 50, 468 F.2d at p. 334.

from the very outset of the case and have raised no new issues at any stage of appeal.

In fact, the reverse is true. It is petitioner who unwarrantedly seeks a second time at bat, having struck out in the Appellate Court below. Respondents' brief in the Appellate Court below listed four distinct issues: "Point I—The Merits (A. The Unbroken Line of Authority Supporting Appellants' Position and B. The Appropriateness of Appellate Decision on the Merits); Point II—The Inappropriateness of Dismissal for Lack of Standing; Point III—The Inappropriateness of Denying Appellants Leave to Add Party Plaintiff(s); and Point IV—The Appropriateness of Appellate Jurisdiction Within This Honorable Court." Point I on the merits consumed approximately one-half of respondents total Argument in its appellate brief, which was served upon petitioner on or about August 28, 1974.

Petitioner within his appellate brief below knowingly elected not to contest nor to argue the merits; nor did petitioner rebut the merits during the course of oral argument below. Petitioner has not been without adequate opportunity to defend the legal merits. Instead, he willingly elected to remain silent. Petitioner was amply forewarned that respondents were petitioning the Appellate Court below for a ruling upon the merits and that the Appellate Court might well decide to reach the same. Petitioner, nevertheless, waived his opportunity to defend and voluntarily foreclosed himself of the opportunity then presented. Petitioner should not be permitted before this Honorable Court to plead that equity demands he be given the opportunity once again to contest the merits.

As one Appellate Court noted, it is,

> "'. . . not a right to afford a defeated litigant another day in court because he thinks that if he were given the opportunity to try his case again upon a different theory he might prevail.' "[77]

This is what petitioner attempts here, an opportunity to argue the merits which he chose not to contend previously, opting to rely entirely upon procedural defenses, although fully apprised that the merits were a prime issue of the appeal.

What is abundantly clear is that the principle and rules urged by the petitioner upon his Honorable Court apply when the party had changed theories in mid-stream of the appellate process and not, where as herein, the party has consistently fostered the same claims or theories throughout at all levels of the proceedings.

The second prevalent rationale for not deciding on appeal, issues not reached below, is the "needs of judicial economy" and the orderly administration of the judicial process.[78] It is clear that in the present cause, both goals were best served by the discretionary decision of the Appellate Court below to rule upon the merits of the issue squarely before them and then ripe for adjudication.

It can not accurately nor fairly be said that the Appellate Court below abused the inherent discretion which it had to rule upon the merits and accordingly, the exercise of such discretion should be affirmed by this Honorable Court.[79]

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[77] *Miller* v. *Avirom*, 384 F.2d 319, 323 (D.C.C. 1967).

[78] *Empire Life Insurance Company of America* v. *Valdak Corporation*, 468 F.2d 330, 334 (5th Cir. 1972).

[79] "Decisions reached in the proper exercise of . . . discretion have frequently been said not to be within the proper scope of appellate review, and it is clearly the ordinary practice of the appellate courts to refuse to review the exercise of such discretion except for abuse." 5 AM.JUR. 2d, Section 772, at p. 215. See, 4 C.J.S., Section 152, at p. 510.

CONCLUSION

Respondents have amply demonstrated the requisite and proper standing of respondent-physicians, as well as the authority and propriety of the Appellate Court's ruling upon the merits.

A soon to be published paper details the experience of Reproductive Health Services, a not-for-profit medical facility providing abortions in the metropolitan St. Louis, Missouri area. For the first eight months of 1975, January 1 through August 31, 846 indigent women, eligible for Missouri medicaid assistance received abortions at that facility alone, for which petitioner pursuant to the appellate decision below on December 31, 1974, made payment of $75.00 on behalf of each. Not a single payment was made during the years 1973 and 1974.

The unconscionable situation, where women of financial means can freely obtain their constitutionally protected medical rights and indigent women are arbitrarily and capriciously denied the use of public funds to procure the same medical right, cannot be condoned. To unwarrantedly exclude welfare payments for abortion is to effectively foreclose indigent women from the full exercise of their constitutional rights, particularly when said payments are made for childbirth. The state cannot be allowed to continue to favor the one choice over the other through an imposition of legislatively imposed ethical standards by financial blackmail.

To allow petitioner to retreat from the policy of payment would effectively abolish the right of abortion to these indigent women. It would create a travesty of health care to the poor and mock the full implication of this Honorable Court's prior decisions in *Roe* and *Doe*, *supra* at p. 10. It would further serve to prolong the ultimate and inevitably successful conclusions of the host of identical cases, now pending at various stages of the judicial process and cited *supra* at fns. 57 and 59.

WHEREFORE, respondent respectfully pray that the opinion of the Appellate Court below as to respondents' standing and the appellate review of the merits be affirmed forthwith.

Respectfully submitted

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Certificate of Service

I, the undersigned attorney for respondents and a member of the bar of the United States Supreme Court, do hereby certify that pursuant to Supreme Court Rule No. 33 I have caused to be served true and correct copies of the foregoing "Brief for the Respondents" upon each party required to be so served, by depositing said copies in a United States Postal Service mail box, with first class postage prepaid and affixed, addressed to The Honorable John C. Danforth, Attorney General of the State of Missouri, Supreme Court Building, Jefferson City, Missouri 65101 and to Mr. Michael L. Boicourt, Assistant Attorney General of the State of Missouri, Supreme Court Building, Jefferson City, Missouri 65101, Attorneys for Petitioner.

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